

The Breadth of Insurance Coverage for Environmental Claims

KIRK A. PASICH*

I. INTRODUCTION

Since the enactment of the Resource Conservation Recovery Act of 1976¹ ("RCRA") and 1980s Comprehensive Environmental Response, Compensation and Liability Act² ("CERCLA"), environmental concerns have become a focus of attention for businesses and industries. RCRA established a national policy to reduce the generation of hazardous waste.³ CERCLA established the Hazardous Substance Response Trust Fund or "Superfund" to initially pay for the cleanup of properties contaminated by hazardous substances.⁴ CERCLA directs the United States Environmental Protection Agency to identify sites at which hazardous substances have been released, identify the parties potentially responsible for the site or the releases, and ensure that these "potentially responsible parties" pay for the cleanup of the sites, including reimbursement of cleanup costs paid by the federal government or by a state.⁵

The breadth of CERCLA and RCRA and the proliferation of environmental statutes and regulations at the federal, state, county, and local level present a significant financial challenge to many corporations and individuals. Many businesses face demands and lawsuits by government agencies to clean up or pay for the cleanup of pollution.⁶ Furthermore, many businesses also face private party lawsuits in which plaintiffs seek recovery on many theories, including negligence, strict liability, trespass, and nuisance.

In the face of these demands and lawsuits, many businesses have turned to their comprehensive general liability ("CGL") insurance policies for financial protection. Most insurance carriers, however, deny that they have any duty to

* Kirk A. Pasich is a litigation partner in the Los Angeles firm of Hill Wynne Troop & Meisinger. He specializes in representing insureds in complex insurance coverage matters and was one of the counsel for the insured, FMC Corporation, in *AIU Insurance Co. v. Superior Court*, and for one of the insureds, GAF Corporation, in *In re Asbestos Insurance Coverage Cases*. He is also the author of *Casualty and Liability Insurance* (Matthew Bender 1991). Mr. Pasich would like to thank Erin M. Walsh for her assistance in locating and verifying authorities quoted and cited in this Article.

¹ 42 U.S.C. §§ 6901-6987 (1982).

² *Id.* §§ 9601-9657.

³ *Id.* § 6902(b).

⁴ *Id.* § 9631.

⁵ *See, e.g., id.* § 9605.

⁶ *Id.* § 9607.

pay the costs of cleaning up the environment or to pay damage claims against their insureds. Thus, insureds and insurance carriers are now litigating over myriad issues with respect to insurance carriers' obligations to defend and indemnify their insureds against claims relating to environmental contamination. The insurance carriers assert broad-based defenses to coverage. When these defenses fail, the insurance carriers turn to fact-based defenses that require months, or years, of discovery, to be followed by months of trial. Additionally, the parties litigate over which portions of the insurance policies provide coverage and how those portions of the insurance policies are to be interpreted.

This Article focuses on the key issues that have been, and will continue to be, the subject of insurance coverage litigation for environmental claims. The discussion commences with an overview of CGL insurance coverage. Then the discussion focuses on interpretation of the language in insurance contracts. This is followed by discussions of four substantive issues—whether the costs of environmental cleanup constitute “damages” insured by CGL insurance policies, the “expected or intended” exclusion, the pollution exclusion, and a relatively unexplored area of insurance coverage for environmental claims, the “personal injury” provisions. This article demonstrates that the insurance industry has, for decades, expected its broad CGL policies to cover pollution-related claims. That expectation has been honored by most courts, which have rejected the insurance carriers' arguments that environmental cleanup costs are not damages, that the expected or intended exclusion eliminates coverage, and that the pollution exclusion eliminates coverage. The same historical perspective and the language of the relevant provisions also demonstrate that, contrary to arguments advanced today, insurance carriers long have expected the personal injury provisions of CGL policies to provide coverage for environmental cleanup. In short, while litigation may rage on for years over insurance coverage for environmental claims, insureds should be expected to prevail in most cases.

II. THE CGL INSURANCE POLICY

Until the 1940s, the insurance industry sold policies that provided coverage only for specific risks. In the late 1940s, this gave way to the “comprehensive” general liability policy, which was intended to insure all risks not specifically excluded.⁷

⁷ See J.M. Campbell, *Specific Policies on the Way Out—Comprehensive Takes Over*, The Local Agent 16 (Mar. 1949) (“[T]oday we have come to the point when separate coverages must give way to a [sic] comprehensive policies for all industrial and mercantile risks.”) The Kentucky Supreme Court has explained the breadth of CGL insurance policies as follows:

A. The Relevant Insurance Policy Language

The insuring agreement of a CGL policy typically provides that the insurance carrier will:

Pay on behalf of the insured all sums which the insured becomes legally obligated to pay as damages because of
[Coverage] A. **bodily injury** or
[Coverage] B. **property damage**
to which this [insurance] applies, caused by an occurrence . . .⁸

“Bodily injury” is typically defined as “bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.”⁹

“Property damage” often is defined as:

- (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
- (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.¹⁰

CGL insurance policies also typically impose on the insurance carrier the separate obligation to defend and/or pay the expenses of defending suits against the insured.¹¹ The defense provision of the standard form CGL policy typically states that the insurance carrier “shall have the right and duty to defend any suit

The primary purpose of a comprehensive general liability policy is to provide broad comprehensive insurance. Obviously the very name of the policy suggests the expectation of maximum coverage. Consequently the comprehensive policy has been one of the most preferred by businesses and governmental entities over the years because that policy has provided the broadest coverage available. All risks not expressly excluded are covered, including those not contemplated by either party.

James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 278 (Ky. 1991), *as modified* (Sept. 26, 1991).

⁸ 3 CALIFORNIA INSURANCE LAW AND PRACTICE App. A (1991).

⁹ *Id.* § 49.05.

¹⁰ *Id.* § 49.06[1].

¹¹ See *American Casualty Co. v. Howard*, 187 F.2d 322, 327 (4th Cir. 1951) (“The obligation to defend suits is entirely independent of the obligation to pay for bodily injuries and property damage. The two obligations are assumed in different paragraphs of the contract and under distinctive sub-heads.”)

against the insured seeking damages on account of . . . bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent"¹² The standard CGL policy also states that the insurance carrier will pay any expenses incurred by the insured and all costs taxed against the insured in any such suit.¹³

While indemnity payments typically reduce or impair the policy's aggregate limit, defense payments generally do not do so. The "Supplementary Payments" section of the 1973 CGL form provides that the expenses incurred by, and costs taxed against, the insured in defending a lawsuit are in addition to the limits of coverage provided.¹⁴

B. Insurance Policy Interpretation

In most states, disputes concerning the meaning of language in insurance policies are resolved by application of long-established contract interpretation principles. These principles may be summarized as follows:

1. The language in insurance policies will be given its plain meaning if it is possible to do so.¹⁵
2. Exceptions, limitations, and exclusions to coverage should be interpreted narrowly.¹⁶
3. An insurance policy should be read as a layman would read it and not as it might be analyzed by an attorney or an insurance expert.¹⁷

¹² 3 CALIFORNIA INSURANCE LAW AND PRACTICE App. A at 41-158 (1991).

¹³ *Id.* App. D at 41-170.

¹⁴ *Id.*

¹⁵ *Unified School Dist. No. 501 v. Continental Casualty Co.*, 723 F. Supp. 564, 566 (D. Kan. 1989); *see Nichols v. Great Am. Ins. Cos.*, 169 Cal. App. 3d 766, 775, 215 Cal. Rptr. 416, 421 (1985) ("Absent a clear indication to the contrary, words in an insurance policy are to be read in their plain and ordinary sense."); *First Ins. Co. v. State*, 66 Haw. 413, 424, 665 P.2d 648, 655 (1983) (insurance policy terms "should be interpreted according to their plain, ordinary, and accepted sense in common speech . . .").

¹⁶ *Traders State Bank v. Continental Ins. Co.*, 448 F.2d 280, 283 (10th Cir. 1969); *Garvey v. State Farm Fire & Casualty Co.*, 48 Cal. 3d 395, 406, 770 P.2d 704, 710, 257 Cal. Rptr. 292, 293 (1989).

¹⁷ *Crane v. State Farm Fire & Casualty Co.*, 5 Cal. 3d 112, 115, 485 P.2d 1129, 1130, 95 Cal. Rptr. 513, 514 (1971); *Griffin v. Maryland Casualty Co.*, 213 Miss. 624, 632, 57 So. 2d 486, 489 (1952) (ambiguous language in insurance policies "should be construed most strongly in favor of the insured").

4. Insurance policy language should be construed to protect the reasonable expectations of the insured. Any ambiguity in an insurance policy is to be resolved against the insurance carrier.¹⁸

5. To protect the insured's expectation of coverage, an insurance policy should be given an interpretation that is "semantically permissible" and will "fairly achieve [the policy's] object of providing indemnity for the loss to which the insurance relates."¹⁹

In spite of these well-established principles, insurance carriers typically argue that if insurance policy language is ambiguous, it should not automatically be interpreted against the carrier. The insurance carriers argue that many corporate insureds are Fortune 500 companies, have substantial bargaining power, have sophisticated risk managers, use large insurance brokers in the procurement of policies, and actually have been able to negotiate particular policy language. They cite two cases to support their arguments: *Garcia v. Truck Insurance Exchange*²⁰ and *Fireman's Fund Insurance Co. v. Fibreboard Corp.*²¹ The insurance carriers' argument, however, should be rejected. These cases are neither controlling nor persuasive in most contexts.

In *Garcia*, there was evidence that the insured negotiated and jointly drafted the policy terms in question. In most cases, such evidence will be lacking. Thus, *Garcia's* impact, if any, should be limited to situations involving substantially similar facts.²² In *Fibreboard*, unlike the common situation, the insured actually drafted and proposed the particular language at issue.

In most situations, the insurance carrier, or an insurance industry organization, such as the Insurance Services Office ("ISO"), will have drafted the insurance policy language. Even if an insurance broker negotiated the

¹⁸ *Royal College Shop, Inc. v. Northern Ins. Co.*, 895 F.2d 670, 674 (10th Cir. 1990); *Crane v. State Farm Fire & Casualty Co.*, 5 Cal. 3d 112, 115, 485 P.2d 1129, 1130, 95 Cal. Rptr. 513, 514 (1971).

¹⁹ *Harris v. Glens Falls Ins. Co.*, 6 Cal. 3d 699, 701, 493 P.2d 861, 862, 100 Cal. Rptr. 133, 134 (1972).

²⁰ 36 Cal. 3d 426, 438, 682 P.2d 1100, 1105, 204 Cal. Rptr. 435, 440 (1984) (ambiguity not construed against insurance carrier when insured negotiated terms of policy, language was jointly drafted, and insured had substantial bargaining power).

²¹ 182 Cal. App. 3d 462, 467-68, 227 Cal. Rptr. 203, 206 (1986) (ambiguity not construed against insurance carrier when insured "proposed or drafted" the exclusion at issue).

²² See *In re Asbestos Ins. Coverage Cases*, Judicial Council Coord. Proceed. No. 1072, Statement of Decision Concerning Phase III Issues, slip op. at 55 (Cal. San Francisco Super. Ct. Jan. 24, 1990) (*Garcia* does not "hold that the mere size of the insured changes the time-honored rule that ambiguous language be construed against the insurer and in favor of coverage."), *appeals docketed*, No. A049419.

relevant language or participated in its drafting, there is a question as to whether the broker was acting as an agent for the insured or the carrier. Therefore, it is not surprising that many courts have rejected the insurance carriers' arguments. As the California Supreme Court recently explained:

We deem [the party who drafted the policy language in question] to be the insurers. They have presented no evidence suggesting that the provisions in question were actually negotiated or jointly drafted. . . . Indeed, the evidence that is before us reveals that such provisions, drafted by the insurers, are highly uniform in content and wording. For the above reasons, we interpret their contents, if ambiguous, in favor of coverage.²³

Furthermore, the insurance carriers' arguments do not reflect their own business practices and procedures. Insurance carriers argue that a court cannot interpret insurance language or rule on potentially dispositive motions, such as summary adjudication motions, without considering the insured's size and sophistication and its use of insurance brokers. In fact, insurance carriers do not consider these factors in interpreting insurance policies when making their decisions on claims. The following is a typical example of testimony by insurance carrier claims representatives on this subject:

Q. So when you are looking at policy language you go by the language and not by how big or little the insured is?

A. Absolutely.

Q. Does it make any difference whether or not an insurance broker was involved in procuring the policy as to how you interpret the policy language?

A. No.

Q. Again, you go by what the policy language says?

A. Yes.

Q. Does it make any difference to you whether or not particular policy language was negotiated insofar as interpreting that policy language?

A. No.

²³ *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 823-24, 799 P.2d 1253, 1265-66, 274 Cal. Rptr. 820, 832-33 (1990). As the court also explained:

These provisions . . . are adopted verbatim from standard form policies used throughout the country. For this reason, even if the policies were "negotiated" in a broad sense, this fact has little bearing on construction of the specific policy language in question here.

Q. And, again, you go by what the policy language says?

A. Yes.²⁴

This testimony creates a problem for insurance carriers. On the one hand, if what the insurance carriers tell courts is correct, then their claims representatives have inappropriately decided to deny coverage because they did not consider the insured's size, sophistication, use of an insurance broker, or involvement in negotiations. In making coverage determinations without this "necessary" information, the insurance carriers may be breaching contractual and statutory obligations. On the other hand, if, as claims representatives testify, this information is not relevant in making a coverage determination, then insurance carriers' representations to the contrary in court are misleading.

Thus, courts should continue to reject the insurance carriers' arguments. There is no "sophisticated insured" exception generally applicable to the rules governing insurance policy interpretation.

III. POLLUTION CLEANUP COSTS AS INSURED "DAMAGES"

As noted above, the typical CGL policy requires the insurance carrier to pay on behalf of the insured all sums that the insured becomes legally obligated to pay *as damages* because of bodily injury or property damage that occurs during the policy period. One of the most heavily contested questions in the disputes between insurance carriers and insureds is whether the term "damages" includes costs incurred by, or imposed on, the insured for cleaning up the environment. More than 100 courts (primarily trial courts) have decided this issue nationally. While insureds have prevailed in most of these decisions,²⁵ insurance carriers still press the battle.

²⁴ Transcript of Deposition of Patrick A. Pisano (Zonal Claim Manager, Chubb & Son, Inc.) at 44-45, *Northrop Corp. v. Evanston Ins. Co.*, No. C566129 (Cal. Los Angeles Super. Ct. July 19, 1989).

²⁵ See, e.g., *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989); *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng. Co.*, 326 N.C. 133, 388 S.E.2d 557 (1990); *Boeing Co. v. Aetna Casualty & Sur. Co.*, 113 Wash. 2d 869, 784 P.2d 507 (1990). But see, e.g., *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

A. *The Plain Meaning of Insurance Policy Language*

Many courts have held that cleanup costs are “damages” within the plain meaning of the CGL policy language.²⁶ In spite of this fact, insurance carriers typically argue that the CGL policies are not ambiguous and that they should be interpreted in accord with their plain meaning. They also argue that while the term “damages” includes monetary compensation for injury, it does not include equitable remedies, such as the costs of complying with injunctions. The insurance carriers argue that costs incurred under CERCLA are like injunctive costs and are, therefore, not “damages.”

However, dictionaries—the source usually used by courts to determine a word’s “plain meaning”²⁷—define the term “damages” broadly, without technical distinctions. “Damages” is defined in one dictionary as:

- 1: Loss or harm resulting from injury to person, property, or reputation.
- 2: pl: compensation in money imposed by law for loss or injury.
- 3: Expense, cost.²⁸

Thus, it is not surprising that courts have rejected the insurance carriers’ proffered “plain meaning” in favor of the “plain meaning” urged by insureds. According to the Washington Supreme Court:

The plain, ordinary meaning of damages as defined by the dictionary defeats [the] insurers’ argument. Standard dictionaries uniformly define the word “damages” inclusively, without making any distinction between sums awarded on a “legal” or “equitable” claim. . . . Indeed, even the insurers’ own dictionaries define “damages” in accordance with the ordinary, popular, lay understanding. . . . Even a policyholder with an insurance dictionary at hand would not learn about the coverage-restricting connotation to “damages” that the insurers argue is obvious.²⁹

²⁶ See, e.g., *National Indem. Co. v. United States Pollution Control, Inc.*, 717 F. Supp. 765, 766-67 (W.D. Okla. 1989); *Chesapeake Utils. Corp. v. American Home Assurance Co.*, 704 F. Supp. 551, 560 (D. Del. 1989).

²⁷ See, e.g., *Royal Globe Ins. Co. v. Whitaker*, 181 Cal. App. 3d 532, 537 n.5, 226 Cal. Rptr. 435, 437 n.5 (1986); *Williams v. North River Ins. Co.*, 579 S.W.2d 409, 412 (Mo. Ct. App. 1979); *Safeco Ins. Co. v. Davis*, 44 Wash. App. 161, 721 P.2d 550 (1986).

²⁸ WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 323 (1986).

²⁹ *Boeing Co. v. Aetna Casualty & Sur. Co.*, 113 Wash. 2d 869, 877-78, 784 P.2d 507, 511 (1990).

B. *The FMC Decision*

In 1990, the California Supreme Court rendered its decision in *AIU Insurance Co. v. Superior Court*.³⁰ This is likely to be an influential decision because the insurance industry aggressively argued the case³¹ and because the California Supreme Court reaffirmed the validity of California's long-established pro-coverage principles of insurance policy interpretation. The court held that CGL policies "cover the costs of reimbursing government agencies and complying with injunctions ordering cleanup under CERCLA and similar statutes."³² The court also held:

[E]ven if government response costs are incurred largely to prevent damage previously confined to the insured's property from spreading to government or third party property (i.e., the costs are "mitigative" in character), reimbursement of such costs constitutes "damages" in ordinary terms. A contrary result would fail to fulfill the reasonable expectations of the parties.³³

The court also rejected the insurance carriers' arguments that the policies issued before enactment of CERCLA do not cover liabilities created by CERCLA. The court noted that because the policies were "comprehensive" liability policies, "it was within the insured's reasonable expectation that new types of statutory liability would be covered"³⁴

C. *The Insurance Industry Intended to Cover Environmental Liabilities and Costs of Cleaning Up Environmental Contamination*

The drafting history of the standard form CGL policy demonstrates that insurance carriers intended to provide coverage for environmental cleanup costs. For example, Lyman J. Baldwin, Jr., an employee of the Insurance Company of North America and a member of the National Bureau of Casualty Underwriters General Liability Rating Committee, stated, in discussing the 1966 standard form policy:

Let us consider . . . a fairly commonplace situation where we have a chemical manufacturing plant which during the course of its operations emits noxious

³⁰ 51 Cal. 3d 807, 799 P.2d 1253, 274 Cal. Rptr. 820 (1990).

³¹ More than 100 insurance companies and underwriters were defendants in the case, numerous amicus curiae briefs were filed, and the Insurance Environmental Litigation Association vigorously briefed and argued the issues before the California Supreme Court.

³² *AIU Ins. Co.*, 51 Cal. 3d at 814, 799 P.2d at 1259, 274 Cal. Rptr. at 826.

³³ *Id.* at 833, 799 P.2d at 1272, 274 Cal. Rptr. at 839.

³⁴ *Id.* at 822 n.8, 799 P.2d at 1264 n.8, 274 Cal. Rptr. at 831 n.8.

fumes that damage the paint on buildings in the surrounding neighborhood. Under the new policy there is coverage until such time as the insured becomes aware that the damage was being done.³⁵

Likewise, Gilbert L. Bean of Liberty Mutual Insurance Company also discussed the industry's intent, describing some of the environmental claims that would be covered under the 1966 standard form CGL policy:

Coverage for gradual BI [bodily injury] or gradual PD [property damage] resulting over a period of time from exposure to the insured's *waste disposal*. Examples would be gradual adverse effect of smoke, fumes, air or stream pollution, contamination of water supply or vegetation. We are all aware of cases such as contamination of oyster beds, lint in the water intake of downstream industrial sites, the Donora, Pa. atmospheric contamination, and the like.³⁶

Given the intent of the drafters of the language contained in the standard CGL policy language, there is a strong evidentiary foundation supporting the many court decisions holding that CGL policies insure the costs of pollution cleanup.

IV. THE EXCLUSION FOR DAMAGE "EXPECTED OR INTENDED" BY THE INSURED

Many insurance carriers argue in court that their corporate insureds intended to pollute and to damage the environment, while the insurance carriers never intended to insure pollution-related damage. These insurance carriers urge the courts to rule that they need not pay for the intentional acts of their insureds and for damage that the insureds expected. This argument is premised upon an "expected or intended" exclusion found in the "occurrence" definition of the 1966 and 1973 standard form CGL policies. These policies define "occurrence" as "[a]n accident, including continuous or repeated exposure to conditions, which results in *bodily injury or property damage neither expected nor intended from the standpoint of the insured*."³⁷

³⁵ Address by Lyman J. Baldwin, Jr. to American Society of Insurance Management 6 (October 20, 1965), Trial Ex. No. 1087, In re Asbestos Ins. Coverage Cases, Judicial Council Coord. Proceed. No. 1072 (Cal. San Francisco Super. Ct. Jan. 24, 1990), *appeals docketed*, No. A049419.

³⁶ Gilbert L. Bean, Summary of Broadened Coverage Under New CGL Policies With Necessary Limitation To Make This Broadening Possible 1 (1966) (emphasis added), Trial Ex. No. 1084, *id.*

³⁷ 3 CALIFORNIA INSURANCE LAW AND PRACTICE § 49.04[2] (1991) (emphasis added). In subsequent versions of the standard form CGL policy, the "expected or intended" language is found in a separate exclusion. For example, the 1987 "occurrence" and "claims made" CGL policies prepared by the Insurance Services Office contain an exclusion stating:

The insurance carriers argue that coverage is excluded if an insured intended an act that results in damage or if the consequences of the act were reasonably foreseeable to someone, even if they were not foreseen by the insured. They seek to prove too much, however, by arguing that *all* pollution-related damage is expected and intended.

A. Insurance Carriers Bear the Burden of Proving That Their Insured's Conduct and Intent Was Wrongful

As a general rule, the insured has the burden of establishing that its claim falls within the basic parameters of coverage, while an insurance carrier has the burden of establishing the applicability of an exculpatory clause.³⁸

In *Clemmer v. Hartford Insurance Co.*,³⁹ the California Supreme Court analyzed the issue of which party bears the burden of proof with respect to a policy exclusion providing that coverage was not applicable "to any act committed by . . . the insured with intent to cause personal injury."⁴⁰ The court concluded that the carrier had the burden of proving that the insured acted with the intent to cause personal injury. As the court explained, "the burden of bringing itself within any exculpatory clause contained in the policy is on the insurer."⁴¹

This insurance does not apply to:

- a. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

Insurance Services Office, Commercial General Liability Insurance Policy Form, *reprinted in* K. PASICH, CASUALTY AND LIABILITY INSURANCE 2-1 & 3-2 (1991).

³⁸ See *Masonite Corp. v. Great Am. Surplus Lines Ins. Co.*, 224 Cal. App. 3d 912, 922 n.7, 274 Cal. Rptr. 206, 212 n.7 (1990) ("The insured has the burden of proving the contract of insurance and its terms, but the insurer bears the burden of bringing itself within an exculpatory clause contained in an insurance policy."); *Merced Mut. Ins. Co. v. Mendez*, 213 Cal. App. 3d 41, 47, 261 Cal. Rptr. 273, 277 (1989) ("[T]he burden is on the insured initially to prove an event is a claim within the scope of the basic coverage The burden then shifts to the insurer to prove the claim falls within an exclusion.")

³⁹ 22 Cal. 3d 865, 587 P.2d 1098, 151 Cal. Rptr. 285 (1978).

⁴⁰ *Id.* at 873 n.5, 587 P.2d at 1101 n.5, 151 Cal. Rptr. at 288 n.5.

⁴¹ *Id.* at 880. The court cited California Evidence Code section 520 in support of its conclusion. Section 520 provides that "[t]he party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." Thus, to the extent that an element of wrongdoing is the basis for an insurance carrier's claim of non-coverage, the insurance carrier should bear the burden of proof, even if the applicable policy language is contained in an insuring agreement rather than in an exclusion.

Many other courts have reached the same conclusion. For example, in *In re Asbestos Insurance Coverage Cases*,⁴² the court concluded that insurance carriers bear the burden of proving that bodily injury was "either expected or intended."⁴³ As the court explained, "to place the burden on the insured would exalt form over substance and ignore the fundamental effect of the language."⁴⁴ As the court also explained:

The purpose and function of the instant clause is to limit coverage, i.e., to define a risk which is excepted from coverage. Inasmuch as it functions as a limitation on the liability of the insurer, it must be treated in the same manner as other provisos, exceptions, and exclusions in the policies. As such, the burden of proving that the [damage] was either expected or intended is on the insurer.⁴⁵

B. "Intentional" Conduct Requires an Intent to Cause Damage, Not Simply the Intent to do an Act That Results in Damage

1. Negligence or Reckless Conduct Is Not Enough

Before an insurance carrier can show that conduct is excluded "intentional conduct," it must prove that there was, in fact, *intentional* conduct committed by the insured. Indeed, many insurance carriers have conceded this. In a brief recently filed in *Shell Oil Co. v. Accident & Casualty Insurance Co.*,⁴⁶ a group of insurance carriers stated:

On one extreme are a few courts that have defined "expected or intended" to mean damage that is reasonably foreseeable by the insured. . . . [T]his standard is indistinguishable from negligence and is therefore inconsistent with liability insurance which is purchased by insureds as protection against liability for negligence.⁴⁷

⁴² Judicial Council Coord. Proceed. No. 1072, Statement of Decision Concerning Phase III Issues 68 (Cal. San Francisco Super. Ct. Jan. 24, 1990), *appeals docketed*, No. A049419.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (citations omitted). See also *Roe v. State Farm Fire & Casualty Co.*, 188 Ga. App. 368, 370, 373 S.E.2d 23, 24 (1988) ("the burden will be on the insurer to prove that the insured expected or intended bodily injury . . ."). In later standard form policies, where the "expected or intended" language is set forth in an express exclusion, the burden clearly rests upon the insurance carrier to prove that injury or damage was "expected or intended from the standpoint of the insured."

⁴⁶ App. Civ. No. A045544 (Cal. Ct. App. Mar. 5, 1991).

⁴⁷ *Id.* Respondents' Joint Brief at 23 (March 5, 1991) (note omitted). The carriers on whose behalf the brief was filed include AIU Insurance Company, Aetna Casualty & Surety

As a result, even if injury is an ordinary consequence of a negligent act, coverage will not be excluded. An example provided by one court demonstrates this point:

An ordinary consequence of driving an automobile without the exercise of ordinary care or an intentional violation of a statute (speed in excess of the maximum speed limit), is injury to the person or property of the driver or a third person. Certainly no one would contend that an injury occasioned by negligent or even reckless driving was not accidental within the meaning of a policy of accident insurance⁴⁸

Therefore, negligence and reckless conduct are insurable and are *not* excluded from coverage by the “expected or intended” exclusion. Indeed, the “expected or intended” exclusion itself speaks in terms of the *resulting property damage or bodily injury* being expected or intended, not in terms of the *act* being expected or intended. Thus, the exclusion should not apply unless an insurance carrier proves that the damage or injury, rather than the act, was “expected or intended from the standpoint of the insured.”

2. Conduct Is Excluded “Intentional” Conduct Only If Insurance Carriers Can Prove That an Insured Had a Preconceived Design to Inflict Harm

a. The Insurance Industry Intended to Exclude Intentional Conduct from Coverage Only If an Insured Intended Wrongful Consequences to Result from Its Acts

Many insurance carriers argue that they need not prove that the particular insured intended to cause damage by its actions. Instead, they contend that they need to show only that the damage was foreseeable or could reasonably have been expected to occur. By advancing these arguments, however, insurance

Company, American Motorists Insurance Company, California Union Insurance Company, Centennial Insurance Company, Columbia Casualty Company, Commercial Union Insurance Companies, Continental Casualty Company, Employers Mutual Casualty Company, Federal Insurance Company, Fidelity and Casualty Company of New York, Fireman’s Fund Insurance Company, Froude and Companies (of the London market), Great American Insurance Company, Hartford Accident & Indemnity Co., Home Insurance Company, Insurance Company of North America, International Surplus Lines Insurance Company, Lumbermen’s Mutual Casualty Company, the North River Insurance Company, Northbrook Excess and Surplus Insurance Company, North Star Reinsurance Company, Pacific Indemnity Company, Prudential Reinsurance Company, St. Paul Fire & Marine Insurance Company, and United States Fire Insurance Company.

⁴⁸ Meyer v. Pacific Employers Ins. Co., 233 Cal. App. 2d 321, 327, 43 Cal. Rptr. 542, 546 (1965).

carriers are attempting to get courts to impose specific restrictions on their policy obligations that the insurance industry often has rejected for more than twenty years.

The "occurrence" definition with its "expected or intended" exclusion was added to the standard form CGL policy in 1966 when the basis of coverage was changed from an "accident" to an "occurrence." The "expected or intended" exclusion in the definition of "occurrence" replaced the intentional injury exclusions that were contained in the "accident" policies issued before 1966. At the same time the drafters of the standard form CGL policy were considering this "expected or intended" exclusion, they considered alternative language as well. This alternative language focused on an objective test of coverage, rather than the subjective test of the "expected or intended" exclusion. It was suggested as part of an exclusion stating: "This policy does not apply to bodily injury or property damage resulting from deliberate acts or omissions of the insured *which with reasonable certainty may be expected to produce injury or damage.*"⁴⁹ This language was rejected in favor of the "expected or intended" exclusion. As Herbert Schoen, one of the key drafters of the policy language, has testified, this "reasonable certainty" language was rejected because it "was too rough to inflict upon . . . insureds and would lead to the demand of its deletion."⁵⁰ As Mr. Schoen further explained, the only thing that the drafters sought to exclude from coverage was "the intentional results of intentional act[s], such as murder. We didn't want to cover that. That is an intentional act with an intentional result."⁵¹

Another insurance company representative similarly explained the effect of the "expected or intended" exclusion in 1966. Willard Obrist, then an assistant manager of the General Accident Group, stated: "[I]nstances arise when the injury is an unintended result of an intentional act. The two situations, an absence of intent or an unexpected result, would be covered under either the 'accident' or 'occurrence' definition."⁵²

After the 1966 standard form CGL policy was introduced, a representative of Johnson & Higgins, an insurance broker, surveyed insurance carriers to seek

⁴⁹ Minutes of the Joint Forms Committee (May 2-4, 1961) (emphasis added), Trial Exhibit No. 977, at 9, In re Asbestos Ins. Coverage Cases, Cal. Judicial Council Coord. Proceed. No. 1072 (Cal. San Francisco Super. Ct. Jan. 24, 1990), *appeals docketed*, No. A049419.

⁵⁰ Trial Transcript 15901 (Mar. 4, 1986), In re Asbestos Ins. Coverage Cases.

⁵¹ *Id.* at 15902.

⁵² Willard J. Obrist, The New Comprehensive General Liability Insurance Policy: A Coverage Analysis 6-7 (Nov. 1966); *see also* George Katz, "Why the New Liability Policy," Reprint of Speech, *The New Liability Policy: Some Highlights* 4 (undated), Trial Exhibit No. 1131, at 4, *id.* ("An occurrence as defined includes the infliction of intentional injury, provided the insured (that is the person against whom claim is being made) did not intend or expect it.")

their explanations of various policy provisions, including the “expected or intended” language. In response, Travelers Insurance Company stated:

We do not anticipate any problems with the phrase “neither expected nor intended from the standpoint of the insured.” Certainly, we will never use the language to deny coverage where the foreseeability of the injury was no more than an element of proof of negligence as this would mean that the liability policy would not cover liability for negligence. The language obliges us to judge coverage from the standpoint of the insured claiming coverage⁵³

Employers Mutual of Wausau responded to Johnson & Higgins’ inquiry as follows:

You ask whether or not we will use the “reasonable man test” in determining whether the insured should have expected the injury rather than determining whether such injury was in fact expected. *The definition of occurrence does not provide for the “reasonable man test.” Thus, the test will be whether such injury was in fact expected.*⁵⁴

The Hartford Insurance Group also provided its understanding of the meaning of the term “expected,” stating that the term means “expected for a certainty.”⁵⁵

More than a decade later, the insurance industry again considered adopting an “objective” or “foreseeability” standard for assessing when injury is expected or intended. In 1977, an exclusion was proposed before an ISO committee that would have excluded coverage for “injury expected or intended from the standpoint of the insured or reasonably certain to occur as a result of the intended act.” This language was designed to make the exclusion “more objective and more enforceable than the previous language because *it adds a new element to this exclusion, i.e., the third party’s viewpoint in addition to the first party’s viewpoint which is purely subjective.*”⁵⁶

While the Ad Hoc Committee concurred with the proposal, the “reasonably certain” language was rejected in favor of “substantially certain to occur” language.⁵⁷ This language, however, was also rejected. As ISO’s Ad Hoc Legal Review Committee noted: “The basic exclusion of expected or intended

⁵³ Letter from R. J. Fisher to Robert F. Bauer (Aug. 19, 1966), Trial Ex. No. 2216, In re Asbestos Ins. Coverage Cases.

⁵⁴ Letter from Jack W. Carroll to Robert F. Bauer (Aug. 19, 1966), Trial Ex. No. 2218, In re Asbestos Ins. Coverage Cases (emphasis added).

⁵⁵ Letter from Harold Schaffner to Robert F. Bauer (Aug. 25, 1966), Trial Ex. No. 2219, In re Asbestos Ins. Coverage Cases.

⁵⁶ Minutes of the Ad Hoc Committee on Special Comprehensive Forms and Rules at 3 (May 3-5, 1977) (emphasis added).

⁵⁷ See Agenda, Executive Committee (Insurance Services Office), Meeting of March 3, 1981.

events should not be extended by this new provision, which can be interpreted so broadly as to deny product coverage in many circumstances.”⁵⁸

The insurance industry specifically considered, and rejected, the “objective” foreseeability test, recognizing that that test would eliminate coverage for even simple acts of negligence. Courts should do the same.

b. Courts Generally Have Concluded That Coverage Is Excluded Only If the Insured Intended Wrongful Consequences from Its Acts

A number of courts have addressed the question of what constitutes “expected or intended” bodily injury and property damage within the purview of the “expected or intended” exclusion. In a recent decision, the Kentucky Supreme Court explained the majority view:

The [insured] is entitled to coverage under its policies unless it has specific and subjective intent to cause the pollution giving rise to the CERCLA claims. The “expected or intended” exception is inapplicable unless the insured specifically and subjectively intends the injury giving rise to the claim. *Partons-Oxford Mutual Insurance Co. v. Dodge*, Me., 426 A.2d 888 (1980). We believe this to be the majority rule, and we agree that if injury was not actually and subjectively intended or expected by the insured, coverage is provided even though the action giving rise to the injury itself was intentional and the injury foreseeable. . . . While the activity which produced the alleged damage may be fully intended, recovery will not be allowed unless the insured intended the resulting damages.⁵⁹

A California trial court, after considering an extensive record regarding the intent of the drafters of the language, reached essentially the same conclusion. In *In re Asbestos Insurance Coverage Cases*,⁶⁰ the court addressed the question of the meaning of the “expected or intended” language. The court first addressed the question in the abstract, determining the appropriate legal standard, which it then applied to a particular factual context. As the court explained, it interpreted the language in the abstract “to determine what level of likelihood, knowledge, or intent is necessary on the part of the insured in order for coverage to be precluded by the clause.”⁶¹ The court then rejected various

⁵⁸ Ad Hoc Legal Review Committee, March 13, 1981, Meeting with Representatives of the General Liability Committee, *Tentative Conclusions* ¶ 5.

⁵⁹ *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 278 (Ky. 1991) (citation omitted), *as modified* (Sept. 26, 1991).

⁶⁰ Cal. Judicial Council Coord. Proceed. No. 1072, Statement of Decision Concerning Phase III Issues (Cal. San Francisco Super. Ct. Jan. 24, 1990), *appeals docketed*, No. A049419.

⁶¹ *Id.* at 67-68.

positions asserted by the parties on the grounds that none of the positions accurately or completely stated the law concerning the meaning of the clause.⁶²

After considering the drafting history behind the "expected or intended" language and the arguments advanced by the parties, the court held:

This Court determines that the "neither expected nor intended" clause applies where the insured acted either wilfully, intentionally, or maliciously for the purpose of causing injury. The intent behind the act in question must involve an element of wrongfulness or misconduct. . . .

One final clarification on the standard is in order. An insurer is not required to produce express testimony or documentation as to an insured's subjective, wrongful intent to cause injury, but may show that reason mandates that by the very nature of the act undertaken, coupled with the knowledge *actually in possession of the insured*, harm must have been intended. This clarification accords with the language of the policy, which speaks in terms of what *was* "expected or intended," and not in terms of what *should have been* "expected or intended."⁶³

In so holding, the court noted that its standard "accords with that adopted in the majority of jurisdictions that have ruled upon this question."⁶⁴

A federal court of appeals addressed this subject in the context of insurance coverage for environmental claims. In *City of Johnstown v. Bankers Standard Insurance Co.*,⁶⁵ the insured owned and operated a landfill that allegedly leaked into the groundwater. The State of New York sued under CERCLA. When the insured tendered the claim to its insurance carriers, they disclaimed coverage and asserted that the damage was "expected or intended" by the insured. The carriers argued that because the insured had notice that the landfill was leaking into the groundwater, the damage was "expected or intended" by the insured. The Second Circuit Court of Appeals rejected this argument, stating:

⁶² The court summarized the positions advanced by the various parties as follows:

The parties urge various meanings as the proper interpretation of the language in question. The policyholders contend that the clause is ambiguous and excludes coverage only if the insurer proves that the insured actually intended that a particular claimant suffer personal injury. Some insurers contend that coverage is barred by the clause if the act undertaken by the policyholder was intended, without regard to whether the policyholder intended to injure any particular claimant. Other insurers urge that the term "expected" must be given a meaning independent of "intended" so as to bar coverage when the resultant damage is a "substantial probability," or is "likely," or is "highly expectable."

Id. at 69.

⁶³ *Id.* at 69-70 (first emphasis added) (citations omitted).

⁶⁴ *Id.* at 71.

⁶⁵ 877 F.2d 1146 (2d Cir. 1989).

In general, what makes injuries or damages expected or intended rather than accidental are the knowledge and intent of the insured. It is not enough that an insured was warned that damages might ensue from its actions, or that, once warned, an insured decided to take a calculated risk and proceed as before. Recovery will be barred only if the insured intended the damages, or if it can be said that the damages were, in a broader sense, "intended" by the insured because the insured knew that the damages would flow directly and immediately from its intentional act.⁶⁶

The court also determined that the "notice" received by the insured prior to the CERCLA action did not support the carriers' argument of intentional conduct:

[P]roof of warnings of possible physical damages is not enough to show that as a matter of law the damages ultimately incurred were expected or intended.

In opting to keep the landfill in operation, the City took a calculated risk. . . .

Here, . . . the record suggests that the City was aware of potential contamination, but not that the City *intended* the resulting damage, nor that the City intending harm, *knew* that the extensive damages alleged in the CERCLA complaint would flow directly and immediately from the City's intentional acts.⁶⁷

⁶⁶ *Id.* at 1150 (citations omitted).

⁶⁷ *Id.* at 1152. Other courts have reached the same conclusion. *See, e.g.,* Alabama Farm Bureau Mut. Casualty Ins. Co. v. Dyer, 454 So. 2d 921, 925 (Ala. 1984) ("the policy term 'expected or intended' injury, cannot be equated with foreseeable injury"); Continental Ins. Co. v. Colangione, 107 A.D.2d 978, 979, 484 N.Y.S.2d 929, 931 (1985) ("to deny coverage, then, the fact finder must find that the insured intended to cause damage."); McGroarty v. Great Am. Ins. Co., 36 N.Y.2d 358, 363, 368 N.Y.S.2d 485, 489, 329 N.E.2d 172, 175 (1975) ("Certainly one may intend to run a red light, but not intend that the catastrophic result of collision with another car occur. Calculated risks can result in accidents.")

As one court explained:

The word "reasonable" is not employed in the exclusion in question and we reject Aetna's plea that we read in a reasonableness standard. It was Aetna which drafted the policy and if it wanted an objective standard to apply, it could have drafted its policy accordingly.

Aetna Casualty & Sur. Co. v. Dichtl, 78 Ill. App. 3d 970, 977, 398 N.E.2d 582, 588 (1979). The court also noted that the phrase "from the standpoint of the insured" (contained within the "expected and intended" language) supported its conclusion that it was the insured's subjective intent that was relevant, not some reasonableness standard:

[B]y referencing the insured, as opposed to a hypothetical reasonable man, this phrase, if anything, supports our imposition of a subjective or personal standard.

In fact, the United States Tenth Circuit Court of Appeals long ago recognized the flaws inherent in the arguments now advanced by insurance carriers. As the Tenth Circuit reasoned:

[I]f the policy did not cover the loss because the natural and probable consequences of the negligent act did not constitute an accident, then by the same logic, there would be no liability where the damage was the unexpected, hence unforeseen result of the negligent act. In the first instance, the damage would be foreseeable and therefore not accidental; in the latter instance, the damage would not be foreseeable and hence no liability upon the insured for his negligent acts. In either instance, the insurer would be free of coverage and the policy would be rendered meaningless.⁶⁸

While a few courts have accepted the insurance carriers' efforts to broaden the scope of the "expected or intended" exclusion to include damage that was not actually expected by the insured, the majority of courts have not done so. Courts that face this issue in the future should do what the majority of courts have done—honor the drafting intent and the plain meaning of the policy language. Insurance coverage should be excluded only if an insured actually expects, to a very high degree of certainty, that property damage or bodily injury will directly result from its actions. If courts take this approach, coverage will not often be excluded. As Maurice Greenberg, the President and CEO of American International Group, Incorporated, one of the largest groups of insurance carriers, has explained:

We should also recognize that, in the majority of cases, [the] companies [now being held responsible for environmental damage] were not acting in a deliberate or irresponsible way. At the time, they were not aware of the future consequences of their waste disposal practices. And business was not alone in this ignorance. Otherwise, federal, state, and local government would have enacted laws to govern the handling and disposal of waste. It is, therefore, understandable, that companies should now bridle at being held responsible for actions that occurred long in the past and which were not illegal, deliberate, or irresponsible at the time.⁶⁹

Id.

⁶⁸ *Hutchinson Water Co. v. United States Fidelity & Guar. Co.*, 250 F.2d 892, 894 (10th Cir. 1957); *see City of Carter Lake v. Aetna Casualty & Sur. Co.*, 604 F.2d 1052, 1058 (8th Cir. 1979) ("Under Aetna's construction of the policy language if the damage was foreseeable then the insured is liable. This is not the law. The function of an insurance company is more than that of premium receiver.")

⁶⁹ Greenberg, *Financing the Cleanup of Hazardous Waste: The National Environmental Trust Fund*, 1 ENV'T'L CLAIMS J. 421, 423 (1989).

Likewise, one court has commented:

The history of coverage and the history of pollution damage alleged in this case goes back 40 to 50 years. As a matter of reality, most of the damage that [the insured] has now been charged with cleaning up was done by it during a period of time when the scientific community had very little knowledge of the overwhelmingly disastrous [sic] effects that this chemical pollution would have. It was not known, for example, how quickly chemicals would leech [sic] from an evaporation pond into the aquifer [sic] underlying the pond and seep from there into adjoining and far distant properties.⁷⁰

C. Indemnification of a Corporate Insured Is Barred Only If the Policymaking Level of Management Acted with the Requisite Malevolent Intent

In the case of a corporate insured, the question of whether the corporation's conduct is excluded "intentional" conduct cannot be answered simply by the insurance carrier proving that someone at the corporation intended the wrongful consequences of an act. Insurance coverage for a corporate insured is barred only if the policymaking level of management acted with the requisite malevolent intent.

The drafters of the 1966 standard form CGL policy clearly intended that coverage would be barred under the "expected or intended" clause of the "occurrence" definition only if the policymaking levels of management intended to cause the injury. George Katz, of Aetna Casualty and Surety Company—one of the principal drafters of the 1966 standard form CGL policy—explained the insurance industry's intent in response to inquiries of Johnson & Higgins:

In order to deny the corporation coverage on the ground that it expected or intended the injury which gave rise to the claim, we would have to show that the level of management responsible for making policy with regard to the act or omission causing the occurrence expected or intended that injury would result We also intend to cover other kinds of injury resulting from intentional acts of employees unless such acts are known to and condoned by or directed by those officials of the corporation responsible for the action of the employee that gave rise to the injury or damage.⁷¹

⁷⁰ Memorandum of Intended Decision on Motion of Certain Defendants for Adjudication that CERCLA Clean-Up Costs Do Not Constitute Damages 14, *FMC Corp. v. Liberty Mut. Ins. Co.*, No. 643058, slip op. at 14 (Cal. Santa Clara Super. Ct. Jan. 3, 1989).

⁷¹ Letter from George Katz of Aetna Casualty & Surety Co. to Robert F. Bauer of Johnson & Higgins (Aug. 31, 1966), Trial Ex. No. 1136, at 5, *In re Asbestos Ins. Coverage Cases*, Cal. Judicial Council Coord. Proceed. No. 1072 (Cal. San Francisco Super. Ct. Jan. 24, 1990), *appeals docketed*, No. A049419.

Courts also have concluded in analogous contexts that insurance coverage for a corporation is not excluded just because a corporate employee intentionally acted to cause damage. For example, in *Fireman's Fund Insurance Co. v. City of Turlock*,⁷² the court addressed the issue of the applicability of California Insurance Code section 533 to an employer's vicarious liability for the willful fraud of its employee. The court concluded that section 533, which prohibits insurance coverage for a loss caused by the insured's willful act,⁷³ does not bar indemnity for vicarious liability based upon the willful fraud of an employee not acting in a "managerial capacity."⁷⁴

A similar conclusion was reached by the Ninth Circuit Court of Appeals in *Dart Industries, Inc. v. Liberty Mutual Insurance Co.*⁷⁵ In *Dart*, the court held that coverage for damages in a libel action was not barred by section 533, despite the fact that the libel was the result of the willful act of the corporate president, acting within the course and scope of his responsibilities. The Ninth Circuit upheld the trial court's ruling that section 533 would not apply without a showing that the board of directors or other senior management authorized or ratified the libelous act.⁷⁶

V. POLLUTION EXCLUSIONS

Beginning in the early 1970s, the insurance industry introduced a form pollution exclusion that is now known as the "sudden and accidental" pollution exclusion. The "sudden and accidental" pollution exclusion reads as follows:

This insurance does not apply:

(f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or

⁷² 170 Cal. App. 3d 988, 216 Cal. Rptr. 796 (1985).

⁷³ California Insurance Code section 533 states that "[a]n insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others."

⁷⁴ 170 Cal. App. 3d at 1001; *see also* California State Auto. Ass'n Inter-Ins. Bureau v. Carter, 164 Cal. App. 3d 257, 263, 210 Cal. Rptr. 140, 144 (1985) (noting in dicta that "[a]n exception to a bar to indemnification for intentional acts under Section 533 is found when an insured is held vicariously liable for compensatory damages caused by another's wilful tort"); *Arenson v. National Auto. & Casualty Ins. Co.*, 45 Cal. 2d 81, 83, 286 P.2d 816, 818 (1955) (exclusion for injuries "caused intentionally by or at the direction of the insured" would not preclude coverage for a parent's vicarious liability for injuries willfully caused by a child, even though the child was an additional named insured).

⁷⁵ 484 F.2d 1295 (9th Cir. 1973).

⁷⁶ *Id.* at 1298-99.

pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.⁷⁷

Later the insurance industry issued an "absolute" pollution exclusion. While there are many variations of this "absolute" pollution exclusion, most track the language of the 1982 ISO form exclusion. This form exclusion purports to exclude coverage for "'bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants"⁷⁸ The "sudden and accidental" and "absolute" exclusions do not, however, completely eliminate coverage for pollution claims.

A. The Sudden and Accidental Pollution Exclusion

When the "sudden and accidental" pollution exclusion was introduced on behalf of the insurance industry, it was represented to be "a clarification of the original intent," as expressed in the definition of the term "occurrence."⁷⁹ The insurance industry, however, now contends that the "sudden and accidental" pollution exclusion was not just a clarification of language in earlier policies, but is instead a broad exclusion that eliminates most coverage for pollution-related damage. As is shown below, this interpretation is not supportable. Instead, the exclusion operates only to eliminate coverage in a narrow range of circumstances.

1. "Sudden and Accidental" Should Be Interpreted as a Clarification of the "Expected or Intended" Exclusion, Not as a Temporal Restriction on Coverage

While courts have reached varying conclusions on the meaning of the phrase "sudden and accidental," a growing majority of courts and the better reasoned decisions have concluded that the phrase "sudden and accidental" clarifies the "neither expected nor intended" language contained in the "occurrence" definition. This conclusion is sound, given the plain meaning of

⁷⁷ Insurance Services Office, Comprehensive General Liability Insurance (Ed. 1-73).

⁷⁸ Insurance Services Office, Inc., Commercial General Liability Insurance Policy Form (Occurrence) (1982), reprinted in K. PASICH, CASUALTY AND LIABILITY INSURANCE, Form 2-2 (1991).

⁷⁹ See Letter from Mutual Insurance Rating Bureau to Hon. Samuel H. Weese, Insurance Commissioner (July 30, 1970), Ex. 9 to Declaration of David W. Steuber in Support of Motion of FMC Corporation for Partial Summary Adjudication of Issues Respecting Certain Policies Issued By Defendants on Grounds of Judicial Estoppel and Collateral Estoppel, FMC Corp. v. Liberty Mut. Ins. Co., No. 643058 (Cal. Santa Clara Super. Ct., motion filed Sept. 26, 1988).

the words "sudden" and "accidental" and the general rule that ambiguous language is to be interpreted in favor of coverage.

Courts throughout the United States have recognized that an appropriate manner to determine the meaning of undefined insurance policy terms is to consult a dictionary.⁸⁰ Many dictionaries define "sudden" when used as an adjective as meaning "happening or coming unexpectedly" and when used as a noun as meaning "an unexpected occurrence."⁸¹ Thesauruses also include "unexpected" and "unpremeditated" as synonyms for "sudden."⁸² Many dictionaries also define "accidental" as "occurring unexpectedly or by chance," "happening without intent or through carelessness and often with unfortunate results."⁸³ And thesauruses include "chance" and "fortuity" as synonyms of "accident," while listing "design, INTENTION" as antonyms.⁸⁴

These and similar definitions have led many courts to conclude that "sudden and accidental" should be interpreted to mean "neither expected nor intended." As one court explained, the dictionary definition of "sudden" "is consistent with the common meaning of the word in everyday parlance."⁸⁵ As another court observed, "sudden" and "accidental" reasonably can be interpreted to mean "neither expected nor intended."⁸⁶ These considerations led the Georgia Supreme Court to conclude that, "even in its popular usage, 'sudden' does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death."⁸⁷ The "sudden and accidental" language "simply [is] a restatement of the definition of 'occurrence.'"⁸⁸ As a result, "applicability of the exception to the pollution clause is not precluded by a long-term or continuous exposure . . . [D]amage caused by accidental or even ordinarily negligent polluters who neither intend nor expect the ensuing damage is indemnifiable despite long-term and repeated polluting activity."⁸⁹ Damage caused by gradual pollution is covered so long as that damage was not expected or intended by the

⁸⁰ See *supra* note 27.

⁸¹ See, e.g., WEBSTER'S NEW COLLEGIATE DICTIONARY 1155 (1980).

⁸² See, e.g., THE NEW AMERICAN ROGET'S COLLEGE THESAURUS 49 (1978).

⁸³ See, e.g., WEBSTER'S NEW COLLEGIATE DICTIONARY 7 (1980).

⁸⁴ See THE NEW AMERICAN ROGET'S COLLEGE THESAURUS 6 (1978).

⁸⁵ *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 530-31, 528 A.2d 76, 83 (1987).

⁸⁶ See *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1362-63 (D. Del. 1987).

⁸⁷ See *Claussen v. Aetna Casualty & Sur. Co.*, 259 Ga. 333, 335, 380 S.E.2d 686, 688 (1989).

⁸⁸ *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 752, 456 N.W.2d 570, 575 (1990).

⁸⁹ *Du-Wel Prods., Inc. v. United States Fire Ins. Co.*, 236 N.J. Super. 349, 357, 565 A.2d 1113, 1117 (App. Div. 1989).

insured.⁹⁰ Thus, many courts have interpreted "sudden and accidental" as it should be interpreted—to exclude coverage only for pollution-related damage that is "expected and intended."⁹¹

Even in the face of the many well-reasoned decisions rejecting their arguments, insurance carriers urge the correctness of decisions adopting their interpretation of the phrase "sudden and accidental."⁹² These decisions, however, also support the insureds' arguments. As many courts have recognized, the mere fact that there is a split in decisions is, itself, persuasive evidence of the ambiguity of the policy language.⁹³ As one court observed, the "comprehensive debate" regarding the meaning of "sudden and accidental" in and of itself "comes close to proving" that the provision is ambiguous.⁹⁴

2. The Insurance Industry Intended the "Sudden and Accidental" Pollution Exclusion Only To Be a Clarification of the "Occurrence" Language

When the insurance industry introduced the "sudden and accidental" pollution exclusion in 1970, it was asked to explain the effect of the exclusion to various state insurance authorities. These authorities were concerned that if the exclusion reduced the coverage previously provided, it would, in effect, result in a premium increase. In addressing these concerns, the Mutual Insurance Rating Bureau ("MIRB"), an insurance industry association, noted:

⁹⁰ See *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 534, 528 A.2d 76, 84 (1987); *Kipin Indus., Inc. v. American Universal Ins. Co.*, 41 Ohio App. 3d 228, 231, 535 N.E.2d 334, 338 (1987) (the pollution exclusion does not eliminate coverage "if the damaging result is neither expected nor intended by the insured . . .").

⁹¹ See, e.g., *Broderick Inv. Co. v. Hartford Accident & Indem. Co.*, 742 F. Supp. 571 (D. Colo. 1989); *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988); *Claussen v. Aetna Casualty & Sur. Co.*, 259 Ga. 333, 380 S.E.2d 686 (1989); *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 180 Ill. App. 3d 378, 535 N.E.2d 1071 (1989); *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220 (Maine 1980); *Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984).

⁹² See, e.g., *United States Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31 (8th Cir. 1988); *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 702 F. Supp. 1317 (E.D. Mich. 1988).

⁹³ See Annotation, *Division of Opinion Among Judges on Same Court or Among Other Courts or Jurisdictions Considering Same Question, As Evidence That Particular Clause of Insurance Policy Is Ambiguous*, 4 A.L.R. 4th 1253, 1255 (1981).

⁹⁴ *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1156 (W.D. Mich. 1988).

[The proposed exclusion] *is actually a clarification of the original intent, in that the definition of occurrence excludes damages that can be said to be expected or intended.* However, coverage would be afforded, as heretofore, where the damage was the result of a discharge, dispersal, release or escape that was sudden and accidental.⁹⁵

Simultaneously, a number of insurance carriers advised insurance brokers and insureds that the new exclusion was nothing more than a "restatement" to clarify the original intent.⁹⁶ Indeed, the Insurance Rating Bureau, another insurance industry organization, stated in 1970 that the proposed "sudden and accidental" language "clarifies the situation" under existing policies in which "expected and intended" damages "are excluded by the definition of 'occurrence' in the policies."⁹⁷

The West Virginia Insurance Commissioner relied upon these and similar statements in approving the "sudden and accidental" pollution exclusion for use. The Commissioner specifically noted that insurance carriers and organizations "have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions . . . are merely clarifications of existing coverages as defined and limited in the definitions of the term 'occurrence'"⁹⁸ The Commissioner therefore found that "[t]o the extent that said exclusions are *mere clarifications* of existing coverages, the Insurance Commissioner finds that there is no objection to the approval of such"⁹⁹

⁹⁵ Letter from Mutual Insurance Rating Bureau to Hon. Samuel H. Weese, Insurance Commissioner (July 30, 1970) (emphasis added), Ex. 9 to Declaration of David W. Steuber in Support of Motion of FMC Corporation for Partial Summary Adjudication of Issues Respecting Certain Policies Issued By Defendants on Grounds of Judicial Estoppel and Collateral Estoppel, *FMC Corp. v. Liberty Mut. Ins. Co.*, No. 643058 (Cal. Santa Clara Super. Ct., motion filed Sept. 26, 1988).

⁹⁶ See, e.g., Letter from B. Buge, Jr., Resident Vice President, Insurance Company of North America, to "All Our Insurance Producers" (April 14, 1970) Ex. U to Declaration of Mark S. Mayerson in Support of Stauffer's and Montrose's Opposition to the Insurers' Motion for Summary Judgment, *Montrose Chem. Corp. v. Canadian Universal Ins. Corp.*, No. C 594 148 (Cal. Los Angeles Super. Ct.) (the "sudden and accidental" pollution exclusion "is, in essence, a re-statement of the basic coverage appearing in existing contract").

⁹⁷ *IRB Files Pollution Liability Exclusions*, BUSINESS INSURANCE 46 (June 8, 1970).

⁹⁸ Order, State of West Virginia Commissioner of Insurance, Administrative Hearing No. 70-4 (Aug. 19, 1970), Ex. 10 to Declaration of David W. Steuber in Support of Motion of FMC Corporation for Partial Summary Adjudication of Issues Respecting Certain Policies Issued By Defendants on Grounds of Judicial Estoppel and Collateral Estoppel, *FMC Corp. v. Liberty Mut. Ins. Co.*, No. 643058 (Cal. Santa Clara Super. Ct., motion filed Sept. 26, 1988).

⁹⁹ *Id.*

Almost two decades later, in light of the insurance industry's continuing efforts to broaden the scope of the pollution exclusion, the West Virginia Insurance Commissioner has spoken again. In *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*,¹⁰⁰ the West Virginia Insurance Commissioner filed an amicus brief addressing the 1970 filing by the MIRB. In its amicus papers, the Commissioner criticizes insurance carriers for now asserting that the exclusion bars coverage unless the pollution arises out of an "abrupt" or "instantaneous" event. The Commissioner states that this new interpretation "would contradict the insurers' representations to the Insurance Commissioner, would do violence to the Insurance Commissioner's Order in 1970, and would undermine the ability of the Insurance Commissioner to protect the public from 'inconsistent, ambiguous or misleading' policy wording."¹⁰¹ The Commissioner also states that the pollution exclusion eliminates coverage only if the damage was specifically expected or intended by the insured, even if the damage occurred gradually.¹⁰² In urging rejection of the insurance industry's misleading interpretation, the Commissioner concludes that "the insurers must be held to their word."¹⁰³

The West Virginia Insurance Commissioner's position is correct. The insurance industry made promises and representations to its customers and to various state agencies. Those promises and representations should be binding¹⁰⁴ and should be enforced.

B. The "Sudden and Accidental" and "Absolute" Pollution Exclusions Do Not Apply in Many Settings

In the face of purported "absolute" pollution exclusions, a number of courts have concluded that such exclusions are unambiguous and that they exclude coverage for all damage caused by the discharge of pollutants.¹⁰⁵ This does not mean, however, that the "absolute" pollution exclusion or the "sudden and accidental" pollution exclusion applies to all claims involving pollution-related

¹⁰⁰ No. CC999 (W. Va. Jan. 1990).

¹⁰¹ Motion of the Insurance Commissioner of West Virginia to File an Amicus Brief at 2, *Liberty Mut. Ins. Co. v. Triangle Indus.*, No. CC999 (W. Va. Jan. 1990).

¹⁰² Amicus Curiae Brief of the Insurance Commissioner of West Virginia at 4, *id.*

¹⁰³ *Id.* at 10.

¹⁰⁴ See Steuber, *The Doctrines of Judicial and Collateral Estoppel: The 1970 Pollution Exclusion Clause Proceedings Before the West Virginia Insurance Commissioner*, 2 ENV'T'L CLAIMS J. 317, 325-28 (1990).

¹⁰⁵ See, e.g., *Guilford Indus., Inc. v. Liberty Mut. Ins. Co.*, 688 F. Supp. 792, 794 (D. Maine 1988) (The absolute pollution exclusion "is clear and unambiguous."), *aff'd*, 879 F.2d 853 (1st Cir. 1989) (mem.); *Mearl Corp. v. Fireman's Fund Ins. Co.*, No. L-5946-90 (N.J. Super. Ct. Mar. 22, 1991) (absolute pollution exclusion "is clear and unambiguous" and excludes coverage).

damage. In fact, courts have recognized situations in which these exclusions do not apply to the claims presented.

1. *Pollution Exclusions Should Not Apply When the Insured Is Not an Active Polluter*

Courts have recognized that pollution exclusions, whether "sudden and accidental" or "absolute," should not apply to exclude coverage for an insured who is not an active polluter. For example, in *Niagara County v. Utica Mutual Insurance Co.*,¹⁰⁶ a county was one of the defendants in the "Love Canal" litigation. Its insurance carrier contended that coverage was excluded by a sudden and accidental pollution exclusion, which had been incorporated in the policy and in New York statutes. The county responded by arguing that because it did not dump or abandon chemicals, and was not charged with doing so, the exclusion should not apply, even though the exclusion did not contain any language limiting its applicability to active polluters. The court agreed, stating:

The fact that the statute, and in this case the exclusionary clause itself, fails to contain language which limits the exclusion to acts by the insured is of no moment, for to hold otherwise would require that we disregard the unqualified public policy intentment of the statute to prohibit polluters from spreading the risk of loss through the instrument of liability insurance.¹⁰⁷

A Washington court of appeals reached a similar conclusion. In *United Pacific Insurance Co. v. Van's Westlake Union, Inc.*,¹⁰⁸ the court stated:

In construing the pollution exclusion clause, we conclude that it was intended to deprive active polluters from coverage, and not to apply where, as here, the damage caused was neither expected nor intended

The insured in the case before us was not an active polluter. The gasoline leaking from a hole in the underground line was not expected or intended, nor was the resulting damage. Thus, the pollution exclusion clause did not exclude coverage for the third party claims and suits against the insured.¹⁰⁹

More recently, an Illinois court of appeals has rejected the application of a pollution exclusion to an insured that was not an active polluter. As the court explained:

¹⁰⁶ 80 A.D.2d 415, 439 N.Y.S.2d 538 (1981).

¹⁰⁷ *Id.* at 419, 439 N.Y.S.2d at 541.

¹⁰⁸ 34 Wash. App. 708, 664 P.2d 1262 (1983).

¹⁰⁹ *Id.* at 710-14, 664 P.2d at 1264-66.

It is not clear from the circumstances of this case, and from the underwriting history of the exclusionary clause . . . , that the parties intended the exclusionary clause to apply whether the insured was an active polluter or not. Certainly, those engaged in manufacturing processes would be expected to have sought other or additional insurance had they known that the mere act of engaging an independent agency such as a waste disposal in the ordinary course of having industrial wastes removed from their property would result in the denial of insurance coverage. There is nothing in the record to show whether such additional insurance was even available when defendants purchased their . . . policy. This ambiguity must be resolved against [the insurance carrier]¹¹⁰

The approach taken by these courts is not a unique or new approach to the application of insurance exclusions.¹¹¹ Indeed, the *Niagara County* court cited as support for its conclusion an earlier decision addressing the applicability of a sistership exclusion (which purportedly excludes coverage for voluntary withdrawal of an insured's products). As the court explained:

In *Lipton, Inc. v. Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, . . . an exclusionary clause made the insurance policy inapplicable to damage claims for the withdrawal of the insured's products from the market because of defects and deficiencies. The court held that this referred to withdrawal of the products by the insured, not third parties, despite the fact that the exclusionary clause was silent on the point.¹¹²

The "sistership" exclusion derives its name from "an incident in the aircraft industry in which one plane crashed and its 'sisterships' were thereafter grounded and recalled by the manufacturer in order to correct the common defect which had caused the crash."¹¹³ A majority of the courts that have considered the sistership exclusion have held that it applies only when the insured, as opposed to a third party, withdraws the defective product. In *Arcos*

¹¹⁰ *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 180 Ill. App. 3d 378, 385, 535 N.E.2d 1071, 1076 (1989).

¹¹¹ See, e.g., *Covington Township v. Pacific Employers Ins. Co.*, 639 F. Supp. 793, 800 (M.D. Pa. 1986) ("[T]he court finds that the [pollution] exclusion does not relieve defendant of its duty to defend claims based on the discharge, etc., of waste material by those other than the named insured."). *Contra* *Outboard Marine Co. v. Liberty Mut. Ins. Co.*, 212 Ill. App. 3d 231, 570 N.E.2d 1154 (Ill. App. Jan. 31, 1991) (rejecting argument that exclusion only applies to active polluters); *but see* *Centennial Ins. Co. v. R.R. Donnelley & Sons Co.*, No. H89-410 (N.D. Ind. Apr. 11, 1991) (refusing to follow *Outboard Marine* and following *Specialty Coatings*).

¹¹² 439 N.Y.S.2d at 541.

¹¹³ *Arcos Corp. v. American Mut. Liab. Ins. Co.*, 350 F. Supp. 380, 384 n.2 (E.D. Pa. 1972), *aff'd*, 485 F.2d 678 (3d Cir. 1973).

Corp. v. American Mutual Liability Insurance Co.,¹¹⁴ for example, the insured manufactured a defective product that was incorporated into a submarine. It was sued for the cost and expenses incurred in investigating, locating, removing, and replacing the defective product. When presented with a claim for coverage, the insurance carrier declined, leading to a lawsuit. The court rejected the application of the “sistership” exclusion, stating that it “applies only if the product or property of which it is a part is ‘withdrawn from the market or from use’ by the insured”¹¹⁵

The same rationale should apply with respect to pollution exclusions. Coverage should be excluded only if the insured caused the pollution; pollution generated by others for which the insured may be held liable is not within the purview of the exclusion.

2. Pollution Exclusions Should Not Apply If the Insured Faces Claims Based on Theories Other Than the Discharge of Pollutants

By their terms, pollution exclusions apply only to bodily injury or property damage arising out of the “discharge, dispersal, release or escape” of pollutants. Thus, if liability is sought to be imposed against an insured for any other reason, the exclusions should not apply. This reasoning has been accepted by courts. In *Niagara County v. Utica Mutual Insurance Co.*,¹¹⁶ for example, a New York court of appeals held:

The complaints in the underlying actions, besides charging the various defendants collectively with dumping and abandoning chemicals, waste products, etc., further allege that Niagara County was negligent in failing to warn and safeguard its citizens or enforce its health regulations, failing to remove chemicals and the plaintiffs from the Love Canal area and negligently and wrongly conveying property in the area without notice of the infirmities contained and in violation of ordinances and regulations. Clearly, these allegations fall outside the disputed pollution exclusion provision of the policy. The general rule is that the insurer must defend provided that some of the allegations fall within the coverage provisions of the policy, even though others do not In order for the insurer to be relieved from its duty to defend, the insurer must “demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 385; see also *Aetna Casualty & Sur. Co. v. PPG Indus., Inc.*, 554 F. Supp. 290, 295 (D. Ariz. 1983) (exclusion “applies only when the insured removes the product from the market due to defects found within a sample of the product. Since no withdrawal, repair, or removal has been made by the insureds, this exclusion is not applicable”); *Bigelow-Liptak Corp. v. Continental Ins. Co.*, 417 F. Supp. 1276, 1281-82 (E.D. Mich. 1976) (same).

¹¹⁶ 80 A.D.2d 415, 439 N.Y.S.2d 538 (1981).

the allegations, in toto, are subject to no other interpretation". . . . In the instant case, [the insurer] has failed to meet that burden.¹¹⁷

An almost identical conclusion was reached by a federal court in *Covington Township v. Pacific Employers Insurance Co.*¹¹⁸ As this court explained:

At most, the improper discharge or storage of sewage is but one of the theories on which the insured's liability is based. Certainly, other theories, i.e., failure to monitor or wrongfully issuing permits, are not contained in the [pollution] exclusion. Again, it is established that if an insurer must defend any claims against an insured in the . . . complaint, it must defend all of them.¹¹⁹

Courts have recognized in dealing with other exclusions that even if one particular theory of liability or claim is excluded, a carrier may still be obligated to respond if another theory of liability or claim is covered. There is no reason to deprive an insured of benefits for one claim in a lawsuit under one provision of a policy simply because coverage for other claims in the suit may be excluded. As one court observed in discussing an insurance carrier's duties for claims involving a product when product coverage was not provided:

Under the cause of action in the proposed pleadings, if proven, plaintiffs' injuries would be caused by the misrepresentations and fraudulent concealment of information which resulted in their not terminating the purchase and use of the product or taking other steps which might have prevented the harmful consequences of continued use. The separate cause of action based on such continued purchase and use of the product resulting from the misrepresentations and fraudulent concealment is distinct from the conduct of defendants in manufacturing and marketing the product which forms the basis of the causes of action in negligence and products liability¹²⁰

Therefore, if an insured is sued on theories or claims premised on its actions or inactions other than its discharge of pollutants, there should be coverage even if the policy contains an "absolute" pollution exclusion.

¹¹⁷ *Id.* at 420-21, 439 N.Y.S.2d at 541-42.

¹¹⁸ 639 F. Supp. 793 (M.D. Pa. 1986).

¹¹⁹ *Id.* at 800.

¹²⁰ *Angie v. Johns-Manville Corp.*, 94 A.D.2d 939, 940, 463 N.Y.S.2d 956, 957 (1983); *see Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531, 537 (8th Cir. 1970) (insurance carrier obligated to defend negligence claim although coverage excluded for claim based on injury to property while in insured's care); *Schwamb v. Fireman's Ins. Co.*, 41 N.Y.2d 947, 949, 363 N.E.2d 356, 357, 394 N.Y.S. 2d 632, 633 (1977) (insurance carrier obligated to defend against failure to warn claim, although insured's conduct fell within criminal conduct exclusion).

3. *Pollution Exclusions Should Not Apply Unless a "Contaminant" or "Irritant" Is Involved*

The 1982 ISO form pollution exclusion purportedly applies, as noted above, to exclude coverage for "bodily injury" or "property damage" arising out of the discharge, dispersal, release, or escape of "pollutants." The ISO form defines pollutants as follows:

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.¹²¹

By its terms, then, a "pollutant" must be an "irritant or contaminant." Therefore, if a substance is not an "irritant or contaminant," the exclusion should not apply.

This approach has been followed by at least some courts. For example, in *In re Hub Recycling, Inc. v. Louis Usdin Co.*,¹²² the court considered insurance coverage for an insured that recycled various materials, including construction debris. The insured requested that its carrier respond to claims against it for allegedly dumping this debris on a third party's property. The carrier declined coverage, citing an absolute pollution exclusion. The court rejected the insurance carrier's argument, concluding that "the insurer must prove that the waste in question is either an irritant or contaminant in order for the exclusion to apply."¹²³

Furthermore, even if a substance arguably is an "irritant or contaminant," it should not be within the purview of a pollution exclusion unless it is recognized to be a hazardous substance. As one court recently explained:

Of course, there is virtually no substance or chemical in existence that would not irritate or damage some person or property. The terms "irritant" and "contaminant," however, cannot be read in isolation, but must be construed as substances generally recognized as polluting the environment. In other words,

¹²¹ Insurance Services Office, Inc., Commercial General Liability Insurance Policy Form ("Occurrence"), reprinted in K. PASICH, CASUALTY AND LIABILITY INSURANCE, Form 2 (1991).

¹²² 106 Bankr. 372 (D.N.J. 1989).

¹²³ *Id.* at 374-75; see also *Guilford Indus., Inc. v. Liberty Mut. Ins. Co.*, 688 F. Supp. 792, 794 (D. Me. 1988) ("[A]lmost any substance might fall within the exclusion, but it can only do so in certain very precisely drawn circumstances: if it is an irritant or a contaminant."), *aff'd*, 879 F.2d 853 (1st Cir. 1989) (mem.); *Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 So. 2d 95, 100 (Ala. 1977) (damage caused by sand and mud resulting from real estate development is not damage caused by "irritant, contaminant or pollutant").

a "pollutant" is not merely any substance that may cause harm to the "egg shell plaintiff," but rather it is a toxic or particularly harmful material which is recognized as such in industry or by governmental regulators.¹²⁴

Thus, the pollution exclusion should apply only if the substance is an irritant or contaminant *and* is recognized to be hazardous.

VI. PERSONAL INJURY COVERAGE FOR ENVIRONMENTAL CLAIMS

In the face of demands for insurance coverage for environmental claims, insurance carriers argue that the only provisions in their insurance policies that could provide coverage for environmental liabilities are those provisions insuring against claims of "bodily injury" and "property damage." They specifically deny that the "personal injury" provisions in CGL insurance policies afford any coverage for environmental claims.¹²⁵ This is not, however, true. Personal injury provisions were introduced to provide broad protection for insureds for a number of "offenses," which encompass the trespass, nuisance, and other claims alleged against insureds in the environmental context.

A. *The Personal Injury Provisions*

In 1966, the National Bureau of Casualty Underwriters drafted a standard endorsement providing coverage for "personal injury" for use in connection with the standard form CGL policies.¹²⁶ The 1966 endorsement provided, in relevant part:

The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury (herein

¹²⁴ *Westchester Fire Ins. Co. v. City of Pittsburgh*, No. 90-2305-0, slip op. at 14 (D. Kan. June 25, 1991). The court also recognized that activity that might release irritating substances can be characterized as "polluting" under the exclusion. *See id.*, slip op. at 13-14.

¹²⁵ "Personal injury" is different from "bodily injury." *See Lumbermen's Mut. Casualty Co. v. United Servs. Auto. Ass'n*, 218 N.J. Super. 492, 499, 528 A.2d 64, 67 (1987) ("personal injury" coverage is not the same as bodily injury coverage in insurance terms It is broader and more comprehensive than the term bodily injury, 'which is limited to impact to the body'); 3 CALIFORNIA INSURANCE LAW & PRACTICE § 49.40[3], at 49-69 (1990) ("[T]he term 'personal' is used in a highly specialized sense. It does not mean physical damage to a person; rather, it means injury arising out of one or more specified offenses.").

¹²⁶ *See* Farbstein & Stillman, *Insurance for the Commission of Intentional Torts*, 20 HASTINGS L.J. 1219 (1969).

called "personal injury") sustained by any person or organization and arising out of one or more of the following offenses:

....

Group C—wrongful entry or eviction, or other invasion of the right of private occupancy. . . .¹²⁷

B. *Personal Injury Provisions Cover Common-Law and Statutory Environmental Claims*

1. *Personal Injury Provisions Cover Claims Based on Trespass, Nuisance, and Interference with the Use or Enjoyment of Property*

The standard personal injury endorsement was adopted in 1966 so that coverage would be broadened and no longer "confined to those damages resulting from 'bodily injury or property damage.'"¹²⁸ Therefore, it is not surprising that courts which have examined the scope of coverage afforded for the "wrongful entry or eviction, or other invasion of the right of private occupancy" offenses have concluded that the coverage applies to a variety of claims alleging interference with interests attending to the possession or enjoyment of real property.

For example, in *Hartford Accident & Indemnity Co. v. Krekeler*,¹²⁹ the Eighth Circuit Court of Appeals held that an insurance carrier whose policy covered "wrongful entry or eviction, or other invasion of the right of private occupancy" was required to defend an action for trespass and battery. The Eighth Circuit concluded that because the trespass made the battery possible and because a trespasser would be liable under applicable state law for all injuries proximately caused by the trespass, the carrier had a duty to defend.¹³⁰

A similar conclusion was reached in *Gardner v. Romano*.¹³¹ In *Gardner*, a federal district court held that a landlord's discrimination against potential tenants based on their race violated their private right of occupancy and was, therefore, insured under a personal injury provision. In so holding, the court rejected the insurance carrier's argument that no coverage was provided because plaintiffs were not alleging any interference with a possessory right. The court held that the phrase "other invasion of the right of private occupancy" is ambiguous and concluded that the policy covered claims for race discrimination.¹³² Other courts have reached similar conclusions.¹³³

¹²⁷ *Id.* at 1239.

¹²⁸ Farbstein & Stillman, *supra* note 126, at 1238.

¹²⁹ 491 F.2d 884 (8th Cir. 1974).

¹³⁰ *Id.* at 885-87.

¹³¹ 688 F. Supp. 489 (E.D. Wis. 1988).

¹³² *Id.* at 492-93.

Courts also have recognized that insurance carriers must defend and indemnify their insureds against claims alleging interference with the use or enjoyment of property. A physical invasion of real property is *not* necessary to trigger coverage—any alleged interference is covered under the “personal injury” provisions of the policies. In *Town of Goshen v. Grange Mutual Insurance Co.*,¹³⁴ for example, the underlying complaint alleged that the town’s planning board had “delayed and obfuscated the attempts made by the plaintiff to gain subdivision approval . . .” for his real property and demonstrated an intent to “deny the plaintiff . . . his right to the *free enjoyment* of his *property*”¹³⁵ The insurance carrier argued that there was no coverage because there were no allegations of invasion, intrusion, or interference by any person or thing upon plaintiff’s land. The New Hampshire Supreme Court rejected this argument, ruling that the carrier had a duty to defend. The court stated:

The trial court ruled that “the right to the private occupancy of land connotes far more than the right to be free merely from physical intrusions.”

....

We cannot accept [the insurance carrier’s] argument that an appreciable and tangible interference with the physical property itself is necessary to constitute an “invasion of the right of private occupancy.”¹³⁶

¹³³ See, e.g., *Fragomeno v. Insurance Co.*, 207 Cal. App. 3d 822, 828, 255 Cal. Rptr. 111, 114 (1989) (“personal injury” provision obligates insurance carrier to defend and indemnify insured for “any act constituting an invasion of the right of private occupancy which incurs tort liability . . .”); *Accredited Bond Agencies, Inc. v. Gulf Ins. Co.*, 352 So. 2d 1252 (Fla. App. 1977) (duty to defend complaint alleging that insured’s purported agent committed aggravated assault and battery by prodding plaintiff’s minor child with a pistol after wrongful entry into plaintiff’s residence); *Cincinnati Ins. Co. v. Davis*, 153 Ga. App. 291, 265 S.E.2d 102 (1980) (wrongful entry coverage obligated insurance carrier to defend suit for conversion when complaint alleged repossession was accomplished by insured’s technically deficient entry onto premises). But see *Martin v. Brunzelle*, 699 F. Supp. 167 (N.D. Ill. 1988) (insurance carrier not obligated to defend insured against discrimination claim).

¹³⁴ 120 N.H. 915, 424 A.2d 822 (1980).

¹³⁵ *Id.* at 916, 424 A.2d at 823-24.

¹³⁶ *Id.* at 917, 424 A.2d at 824. Other courts have reached similar conclusions. See, e.g., *Town of Stoddard v. Northern Sec. Ins. Co.*, 718 F. Supp. 1062, 1064-65 (D.N.H. 1989) (enactment of zoning amendment limiting development constitutes “personal injury”); *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 509 So. 2d 940 (Fla. App. 1985) (personal injury provisions cover allegations of discrimination that prevented claimants from using or enjoying their property and from obtaining marketable title thereto without physical invasion), *aff’d on rehearing en banc*, 509 So. 2d 945 (Fla. App. 1987), *rev’d on other grounds*, 549 So. 2d 1005 (Fla. 1989).

Insurance carriers also have attempted to limit the breadth of the personal injury coverage by arguing that the phrase "wrongful entry or eviction or other invasion of the right of private occupancy" does not include within its scope trespass or nuisance claims. This argument is not supportable. "Trespass" and "nuisance" are torts involving interference with the possession or ability to use property. "Trespass," for example, is customarily defined to be a "wrongful entry"—one of the precise offenses covered under personal injury provisions.¹³⁷ Indeed, legal commentators long ago recognized that there are "a broad range of wrongs under the general heading of 'invasion of the right of private occupancy,' which might be covered under Group C."¹³⁸

Given the lack of support for any arguments narrowing the scope of the personal injury provisions to exclude coverage for trespass and injury claims, it is not surprising that insurance carrier representatives have testified that personal injury provisions apply to trespass and nuisance claims, both as part of the phrase "wrongful entry" and as part of the phrase "other invasion of the right of private occupancy."¹³⁹ Therefore, there should be little legitimate dispute that personal injury provisions apply to trespass and nuisance claims.¹⁴⁰

¹³⁷ See *Triscony v. Brandenstein*, 66 Cal. 514, 516, 6 P. 384, 385 (1885) ("[E]very wrongful entry upon lands in the occupation or possession of the owner constitutes a trespass . . ."); *Hansen v. Gary Naugle Constr. Co.*, 801 S.W.2d 71, 74 (Mo. 1990) ("The essence of the [trespass] action is wrongful entry."); R. Mehr, et al., *Principles of Insurance* 67 (8th ed. 1985) ("Trespass to real property arises from the wrongful entry on the land of another or failure to remove property from another's land when an obligation exists to do so. Trespass includes invasion of the area above and below the land as well as the surface of the land."); see, e.g., *Littleton v. State*, 66 Haw. 55, 656 P.2d 1336 (1982).

¹³⁸ *Farbstein & Stillman*, *supra* note 126, at 1240-41. As these commentators observe: "Thus coverage is afforded for interference with possession and enjoyment by means such as noise, leaky roofs, obstruction of access, obnoxious fumes, and others, actionable on a variety of theories such as breach of a lease, nuisance or trespass." *Id.* at 1241 n.96.

¹³⁹ See, e.g., Transcript of Deposition of Pacific Indemnity Company at 182-84, Ex. K to Notice of Motion and Motion by Northrop for Summary Adjudication of Issues Against Continental, Great American, and Pacific Indemnity ("Personal Injury"), *Northrop Corp. v. Evanston Ins. Co.*, No. C 566129 (Cal. Los Angeles Super. Ct. Jan. 26, 1989) (claims of trespass, invasion of right of private occupancy and interference with use of property are potentially covered under personal injury coverage provisions); Transcript of Deposition of Great American Insurance Company, at 128-29, Ex. J to Northrop Motion, *id.* (same).

¹⁴⁰ However, some insurance carriers attempt to distinguish between "public nuisance" and "private nuisance," arguing that there should be no coverage under personal injury provisions for "public nuisance" because "public nuisance" does not involve an interference with the right of *private* occupancy. This argument should be rejected. First, the offense of "wrongful entry or eviction" is not limited to a "private occupancy" setting. *Beltway Management Co. v. Lexington-Landmark Ins. Co.*, 746 F. Supp. 1145, 1153 (D.D.C. 1990) ("The elision of 'wrongful' in front of eviction indicates that wrongful entry and wrongful eviction are part of the same group. The second conjunction indicates a second

2. *Pollution Claims Are Premised on Trespass, Nuisance, and Interference Theories*

It has been recognized for centuries that common-law tort theories supply an injured party with relief for pollution-caused damages.¹⁴¹ The two most heavily used causes of action for addressing pollution-related damages have been causes of action for trespass and nuisance.¹⁴² Therefore, many insureds have been sued for environmental damage by private parties and government entities on theories of trespass, nuisance, and interference with the use and enjoyment of the plaintiffs' property.

In addition to facing common-law claims for environmental damage, many insureds also face demands, claims, and suits arising from CERCLA, RCRA, and other environmental laws. These laws derive from common-law causes of action, including causes of action for nuisance and trespass. Congress' intent to codify longstanding common-law concepts that historically had been applied to pollution claims is evidenced in the legislative history of CERCLA. For example, the Senate Committee on Environment and Public Works, in its Report accompanying S. 1480 (the Senate version of the bill that ultimately was

grouping [for "other invasion of the right of private occupancy"], and 'other' emphasizes that this *second group refers to a different type of harm.*") (emphasis added).

Second, the distinction between "public" and "private" nuisance is limited to the nuisance context; it has no application to trespass claims. Third, the fact that a "public" nuisance may be involved does not eliminate the potentiality for the involvement of a "private" nuisance. *See, e.g.,* *Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal. App. 3d 116, 124, 99 Cal. Rptr. 350, 355 (1971) ("Where . . . the nuisance is a private as well as a public one, there is no requirement that the plaintiff suffer damage different in kind from that suffered by the general public and he 'does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree'").

¹⁴¹ As Lord Blackstone stated in the Eighteenth Century:

[I]f one erects a smelting house for lead so near the land of another, that the vapor and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance

[I]t is a nuisance . . . to corrupt or poison a waterecourse, by erecting a dye-house or a lime-pit for the use of trade, in the upper part of the stream; or in short to do any act therein, that in its consequences must necessarily tend to the prejudice of one's neighbour.

3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 217-18 (1758) (notes omitted).

¹⁴² *See Note, State Common Law Actions and Federal Pollution Control Statutes: Can They Work Together?*, 1986 U. ILL. L. REV. 609, 609 n.4 (trespass and nuisance are two of the traditional common law tort actions used by courts to address pollution).

enacted as CERCLA),¹⁴³ states that common-law nuisance theories are one of the sources of CERCLA's strict liability provisions: "Another source of legal precedent for strict liability for hazardous substance disposal sites or contaminated areas is nuisance theory. Damage actions involving the maintenance of a public or private nuisance often involve a kind of strict liability standard."¹⁴⁴

There also is Congressional recognition that RCRA incorporates common-law theories. According to a House of Representatives subcommittee, "[s]ection 7003 [of RCRA] incorporates the legal theories used for centuries to assess liability for creating a public nuisance (including intentional tort, negligence and strict liability) for determining appropriate remedies. Terms such as 'imminent' and 'substantial' have a rich judicial history from common law nuisance actions."¹⁴⁵ Indeed, the common law of nuisance provides the theoretical foundation for environmental statutory enactments during the last twenty-five years: "the legal history of the environment has been written by nuisance law."¹⁴⁶

In light of the legislative history and the extensive commentary tracing the development of environmental statutes to common law concepts, it is not surprising that courts have uniformly concluded that CERCLA and RCRA incorporate common-law concepts of liability. In *New York v. Shore Realty Corp.*,¹⁴⁷ for example, the Second Circuit Court of Appeals upheld the district court's power to hear state law public nuisance claims along with federal CERCLA claims, because the common-law claims and CERCLA claims

¹⁴³ See *Exxon Corp. v. Hunt*, 475 U.S. 355, 368-69 (1986) ("After S. 1480 ran into opposition, the Senate considered two compromise bills intended to be 'a combination of the best of [H.R. 85, H.R. 7020, and S. 1480].' . . . The second of these . . . eventually became CERCLA.") (quoting 126 Cong. Rec. 30935 (1980) (remarks of Sen. Stafford)).

¹⁴⁴ Senate Comm. on Environment and Public Works, *Environmental Emergency Response Act*, S. Rep. No. 848, 96th Cong., 2d Sess. 14 (1980).

¹⁴⁵ House Subcomm. on Oversight and Investigations, Comm. on Interstate and Foreign Commerce, *Report (Hazardous Waste Disposal)* 31, 96th Cong., 1st Sess. (Comm. Print 1979). See Senate Comm. on Environment and Public Works, *Solid Waste Disposal Act Amendments of 1980*, S. Rep. No. 172, 96th Cong., 2d Sess., at 5, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5019, 5023 (same).

¹⁴⁶ 1 W. RODGERS, *ENVIRONMENTAL LAW: AIR AND WATER*, 5-7 (1986). Most state statutes also are patterned after federal statutes (which, in turn, incorporate common law theories) or are based directly on common-law theories. See, e.g., *State v. Ventron Corp.*, 94 N.J. 473, 499, 468 A.2d 150, 163 (1983) ("[T]he [New Jersey] Spill Act does not so much change substantive liability as it establishes new remedies for activities recognized as tortious both under prior statutes and the common law.").

¹⁴⁷ 759 F.2d 1032 (2d Cir. 1985).

clearly derive from a common nucleus of operative fact.¹⁴⁸ Other courts have reached the same conclusion.¹⁴⁹

3. *Personal Injury Provisions Apply to Pollution Claims*

The insurance industry has long been aware that its insurance policies, including personal injury provisions, apply to claims of trespass, nuisance, and pollution-related damage. Commentators stated more than twenty years ago that personal injury coverage applied to claims of "nuisance or trespass" and claims based on "obnoxious fumes"¹⁵⁰ Likewise, more than a decade ago, ISO specifically considered expanding the standard form pollution exclusion so that it would apply to personal injury. As ISO drafters stated in discussing a proposed new version of the exclusion:

By using the new defined term "injury" this [pollution] exclusion is now applicable to "personal injury" as well as "bodily injury" and "property damages." This became necessary because there was a case under which the court found that the insurer was liable for a pollution case under the personal injury coverage.¹⁵¹

While ISO did not adopt the recommended change in the pollution exclusion, this memorandum clearly evidences that the insurance industry's drafting arm felt that without the modification, personal injury coverage would apply to environmental claims.

Two years after ISO rejected the extension of the pollution exclusion to personal injury provisions, the American Insurance Association ("AIA"), another trade association, acknowledged during congressional debates over the enactment of CERCLA that standard form CGL insurance policies were

¹⁴⁸ *Id.*

¹⁴⁹ See, e.g., *United States v. Waste Indus., Inc.*, 734 F.2d 159, 167 (4th Cir. 1984) (section 7003 of RCRA is "a congressional mandate that the former common law of nuisance, as applied to situations in which a risk of harm from solid or hazardous wastes exists, shall include new terms and concepts which shall be developed in a liberal, not a restrictive, manner"); *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1184 (N.D. Cal. 1988) (an assessment by the Environmental Protection Agency that a site is targeted for cleanup "is tantamount to a governmental finding that the land is a public nuisance"); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 199 (W.D. Mo. 1985) ("it is quite clear that Section 7003 is essentially a codification of the common law of public nuisance").

¹⁵⁰ Farbstein & Stillman, *supra* note 126, at 1241 n.96.

¹⁵¹ Comments, "Exclusion-Contamination or Pollution," Revised Explanatory Memorandum and Analytical Comments to Revised Draft of Commercial General Liability Policy, attached to Letter, M. Jendraszek, General Liability Division of ISO to the Members of the General Liability Rules and Forms Committee (Sept. 28, 1978).

intended to provide coverage for the common-law claims of trespass and nuisance. In a letter to the Senate Committee on Commerce, Science and Transportation, the AIA stated: "Premiums collected for insurance contracts for pollution liability terminated years in the past were based on common law theories of liability such as negligence, trespass, nuisance and riparian rights."¹⁵² The AIA also observed:

S. 1480 would apply the most advanced common law theories of liability . . . to fact situations which took place and insurance contracts which were made years ago If the occurrence which results in alleged liability is continual, insurers which provided pollution liability coverage years ago may be subjected to the liability concepts in S. 1480.¹⁵³

Having lost in its attempts to keep CERCLA from being enacted, the insurance industry later launched another effort to avoid liability under CGL insurance policies. When Congress considered the reauthorization of CERCLA in 1984 and 1985, the AIA unsuccessfully attempted to have Congress legislatively eliminate insurance coverage for CERCLA-based claims. Specifically, the AIA proposed that the reauthorization include what it called the "Silver Bullet" Amendment:

No insurer shall be liable under any policy of liability insurance with an inception date before December 11, 1980, for defense with respect to, or payment or indemnification of, costs of response, removal, remedial action or damages, as defined in CERCLA and recoverable under CERCLA or any other law, on property owned, leased, or used by the policyholder or on property where hazardous substances for which the policyholder is alleged to have any legal responsibility have been placed for storage, treatment or disposal.¹⁵⁴

If enacted, the Silver Bullet Amendment would have eliminated coverage for *all* environmental liabilities predating the enactment of CERCLA. As a representative of Crum & Forster Insurance Companies stated in explaining the effect of the Silver Bullet Amendment to a Senate Committee's Majority Counsel: "But whether the costs are imposed pursuant to Federal statute or

¹⁵² 96 Cong. Rec. S12919-20 (daily ed. Sept. 18, 1980) (statement of Sen. Cannon) (letter, Sept. 17, 1980, American Insurance Association to Senator Howard W. Cannon).

¹⁵³ *Id.*

¹⁵⁴ Draft Amendment to Section 107 (June 25, 1985), Enclosure to Letter from Leslie Cheek, III, Vice President-Federal Affairs, Crum & Forster Insurance Companies, to Curtis A. Moore, Majority Counsel, Senate Comm. on Environment & Public Works (June 26, 1985). Perhaps because of concern about the impact of calling the proposed amendment the "Silver Bullet" amendment, the name of the amendment was changed to "COPI"—"Clarification of Policy Intent."

State statutory or common law, the effect of the amendment is to preclude coverage of those costs under the identified liability insurance policies."¹⁵⁵

By these actions, the AIA acknowledged that common-law claims of trespass and nuisance for environmental damage were covered under CGL policies, that CERCLA embodies those common-law liability concepts, and that, therefore, CERCLA claims are also insured under CGL policies. In spite of these facts, insurance carriers now argue that personal injury coverage does not apply to trespass or nuisance claims in the environmental setting. Some courts have accepted the insurance carriers' argument.¹⁵⁶ The few decisions to accept the insurance carriers' argument, however, typically have done so without any analysis or reasoning, thereby severely limiting the precedential and persuasive value of those decisions.¹⁵⁷

To date, only one federal appellate court has examined and analyzed a personal injury coverage provision to determine whether it applies to environmental claims. In *Titan Holdings Syndicate, Inc. v. City of Keene*,¹⁵⁸ the United States Court of Appeals for the First Circuit applied a personal injury coverage provision to environmental claims. In *Titan Holdings*, the insured city had been sued by two individuals who alleged that they had been "continuously bombarded by and exposed to noxious, fetid and putrid odors, gases and particulates, to loud and disturbing noises during the night, and to unduly bright night lighting' emanating from the City's sewage treatment plant"¹⁵⁹ The complaint included claims characterized as trespass and nuisance and alleged that the operation of the sewage plant had "unreasonably and substantially interfered with" the plaintiffs' "quiet enjoyment of the homestead" and had substantially deprived them "of the use of the homestead."¹⁶⁰ The city sought coverage from its insurance carriers. The carriers responded with various grounds for refusing to cover the claims, including assertion of the pollution exclusion.

After considering the various arguments, the First Circuit addressed the question of whether the allegations before it were within the tort of "wrongful entry":

¹⁵⁵ Letter from Leslie Cheek, III, Vice President-Federal Affairs, Crum & Forster Insurance Companies, to Curtis A. Moore, Majority Counsel, Senate Comm. on Environment & Public Works (June 26, 1985).

¹⁵⁶ See, e.g., *Morton Thiokol, Inc. v. General Accident Ins. Co.*, No. C-3956-85 (N.J. Super. Ct. Aug. 27, 1987) ("The personal injury clause of the policies do not provide coverage to plaintiff.").

¹⁵⁷ See, e.g., *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, No. 86 MR 308 (Ill. Lake County Cir. Ct. May 17, 1989) (court's analysis consisted only of statement that it "discounts" the personal injury clause "as not being applicable to the facts of this case").

¹⁵⁸ 898 F.2d 265 (1st Cir. 1990).

¹⁵⁹ *Id.* at 267.

¹⁶⁰ *Id.*

The City also attempts to portray the [complaint] as alleging that the plant's fumes, noise and light constitute a wrongful entry of, or eviction from, their property. While we have been unable to find any New Hampshire cases defining a tort of wrongful entry, we think it most closely resembles that of trespass. (Indeed, the [plaintiffs] labelled Count I of their [complaint] as sounding in "trespass and nuisance.")¹⁶¹

The court concluded, however, that trespass had not been alleged because there was no allegation of intentional conduct as required under New Hampshire law.¹⁶²

The court did not find this to be determinative because one of the insurance policies covered "wrongful entry or eviction *or other invasion of the right of private occupancy*."¹⁶³ The court noted that two New Hampshire cases held that the phrase "other invasions of the right of private occupancy" is ambiguous.¹⁶⁴ Given the ambiguity of this phrase, the court concluded that the claim before it was covered by personal injury provisions:

The underlying claim in this case contains allegations that the City's sewage treatment plant's noxious odors, noise and light have "unreasonably and substantially interfered with [plaintiffs'] quiet enjoyment of the homestead and have substantially deprived [them] of the use of the homestead." *Town of Goshen* does not require an allegation of *physical* invasion before a claim comes within coverage for liability arising from "other invasion of the right of private occupancy." Therefore, construing the clause in favor of the insured, it is reasonable and consonant with the ordinary meaning of the clause to hold that the [plaintiffs'] suit alleges just such an invasion, and so is covered by [the] policy.¹⁶⁵

The court specifically held that the "claims of liability for interference with quiet enjoyment and use of [plaintiffs'] home arising from any means alleged, including pollutants, fall within the Personal Injury coverage"¹⁶⁶

In light of the breadth of the personal injury language, the actions of ISO and the AIA, and prior judicial decisions construing the personal injury provision, the conclusion of the *Titan Holdings* court is well reasoned and

¹⁶¹ *Id.* at 272.

¹⁶² *Id.*

¹⁶³ *Id.* (emphasis added).

¹⁶⁴ *Id.* (discussing *Town of Goshen v. Grange Mut. Ins. Co.*, 120 N.H. 915, 424 A.2d 822 (1980) and *Town of Epping v. St. Paul Fire & Marine Ins. Co.*, 122 N.H. 248, 444 A.2d 496 (1982)).

¹⁶⁵ *Id.* at 273.

¹⁶⁶ *Id.* at 274.

persuasive. It is a conclusion that is likely to be, and should be, followed by other courts.¹⁶⁷

C. *The Benefits for Insureds of Personal Injury Provisions*

Personal injury coverage provisions provide substantial benefits to insureds. There are at least five benefits. First, personal injury provisions typically contain aggregate limits of coverage separate and in addition to those for other coverages provided by a CGL insurance policy. This means that even if an insured has exhausted its bodily injury and property damage coverages, personal injury coverage may be available.

Second, personal injury provisions typically do not contain an "occurrence" trigger. Most personal injury provisions, including the standard form endorsements, apply to "offenses" rather than to "occurrences." Courts and commentators have concluded that coverage under personal injury provisions does not require that there be an "occurrence."¹⁶⁸ As one court explained:

The Court also rejects [the insurance carrier's] assertion that coverage is precluded because there has not been an "occurrence" as defined by the General Policy. An occurrence is only required if there is a claim for "bodily injury" or "property damage"; the Broad Form Endorsement does not make the existence of an occurrence as defined by the general liability policy a prerequisite to coverage.¹⁶⁹

This means that personal injury provisions in policies in effect over many years potentially provide coverage. As courts have recognized, a "continuing trespass" or a "continuing nuisance" may be deemed to take place from first

¹⁶⁷ A number of trial courts have reached the same conclusion. *See, e.g., City of Edgerton v. General Casualty Co.*, No. 90-CV-939, slip op. at 2-3 (Wis. Cir. Ct. May 10, 1991) ("I find the personal injury provisions provide coverage for damages sustained because of the migration of the [volatile organic compounds] into the ground water Under the subject policies, this [contamination] constitutes both a personal injury and property damage.").

¹⁶⁸ *See, e.g., Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 509 So. 2d 940, 942 (Fla. App. 1985) ("[N]owhere in the personal injury liability coverage provision is there a requirement that any claim be based on an occurrence."), *aff'd on rehearing en banc*, 509 So. 2d 945 (1987), *rev'd on other grounds*, 549 So. 2d 1005 (Fla. 1989); Farbstein & Stillman, *supra* note 126, at 1239 (one of the most important features of the standard form personal injury endorsement is "the absence of any requirement that the loss be 'caused by an occurrence'"); 1 P. LIGEROS, *THE ATTORNEY'S UMBRELLA BOOK, Underlying Coverage* at 18 (1989) ("The word 'offenses' usually triggers primary personal injury coverages, so coverage is not impaired by the definition of 'occurrence' in the CGL.").

¹⁶⁹ *Town of Stoddard v. Northern Sec. Ins. Co.*, 718 F. Supp. 1062, 1065 n.3 (D.N.H. 1989).

contamination by a hazardous substance through abatement of the contamination.¹⁷⁰ Therefore, an "offense" should, for coverage purposes, be deemed to have taken place as long as the substance was alleged to be present. This should result in coverage under policies predating the discovery of the contamination and should mean that several policies could cover a particular environmental problem, even if a narrow "occurrence" definition is imposed for purposes of property damage coverage.

Third, personal injury provisions cover intentional conduct. In fact, while other portions of CGL policies exclude coverage for bodily injury or property damage "expected or intended" by the insured, standard personal injury provisions contain no such exclusionary language. Therefore, many courts have upheld the applicability of personal injury coverage to intentional torts.¹⁷¹ An

¹⁷⁰ See, e.g., *Regan v. Cherry Corp.*, 706 F. Supp. 145 (D.R.I. 1989). In *Regan*, a federal district court addressed the propriety of a trespass cause of action brought by the owners of property against the former lessee of adjacent property who allegedly contaminated the owners' property with hazardous wastes. The owners contended that the allegations that the former lessee had deposited waste on land and left it there stated a valid claim under the continuing trespass doctrine. The court cited to the Restatement (Second) of Torts for the definition of "continuing trespass" as follows:

Continuing trespass. The actor's failure to remove from land in the possession of another a structure, chattel, or other thing which he has tortiously . . . placed on the land constitutes a continuing trespass for the entire time during which the thing is on the land and . . . confers on the possessor of the land an option to maintain a succession of actions based on a theory of continuing trespass or to treat the continuance of the thing on the land as an aggravation of the original trespass

Id. at 150 (quoting RESTATEMENT (SECOND) OF TORTS § 161, comment b (1965)). The court concluded that "plaintiffs have stated a valid tort claim under the continuing trespass doctrine." *Id.* at 151. See also *Miller v. Cudahy Co.*, 592 F. Supp. 976, 1004-05 (D. Kan. 1984) (salt plant discharges constitute continuing public and private nuisances); *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 530 (Ala. 1979) ("[I]f the smoke or polluting substance . . . causes discomfort and annoyance to the plaintiff in his use and enjoyment of the property, then the plaintiff's remedy is for nuisance; but if, as a result of the defendant's operation, the polluting substance is deposited upon the plaintiff's property, thus interfering with his exclusive possessory interest by causing substantial damage to the Res, then the plaintiff may seek his remedy in trespass, though his alternative remedy in nuisance may coexist."). Other courts have reached similar conclusions. See, e.g., *Mangini v. Aerojet-Gen. Corp.*, 230 Cal. App. 3d 1125, 1147, 281 Cal. Rptr. 827, 841 (1991) ("We note plaintiffs' land may be subject to a continuing nuisance even though defendant's offensive conduct ended years ago. That is because the 'continuing' nature of the nuisance refers to the continuing damage caused by the offensive condition, not to the acts causing the offensive condition to occur.").

¹⁷¹ See, e.g., *Zurich Ins. Co. v. Peterson*, 188 Cal. App. 3d 438, 232 Cal. Rptr. 807 (1986) (malicious prosecution); *Hartford Accident & Indem. v. Krekeler*, 491 F.2d 884 (8th

ISO drafting committee also has acknowledged that personal injury coverage applies to intentional torts, noting that "'personal injury' usually involves offenses which are 'intentional torts'"¹⁷²

Fourth, the typical personal injury coverage endorsement does not contain, and is therefore not subject to, a pollution exclusion or an owned property exclusion, which are the two exclusions frequently cited by insurance carriers in denying coverage for environmental claims. Additionally, even in situations when personal injury coverage is provided in the body of the policy, rather than in a separate endorsement, the pollution exclusion and owned property exclusion typically are limited in their applicability, by their express terms, to bodily injury and property damage only.¹⁷³

Cir. 1974) (battery). However, one court has held that coverage for certain intentional conduct—religious discrimination in the case before it—is prohibited by public policy. *See Ranger Ins. Co. v. Bal Harbour Club*, 549 So. 2d 1005 (Fla. 1989). The court based its decision on Florida's clearly expressed policy against intentional acts of religious discrimination and the lack of other deterrents, such as substantial risks or expenses. *But see Gardner v. Romano*, 688 F. Supp. 489 (E.D. Wis. 1988) (personal injury provisions apply to race discrimination claim). However, given the stringent nature of CERCLA and other environmental laws and the significant expense of cleanup activities (plus possible fines), there are deterrents to intentional environmental pollution. Therefore, the possible availability of personal injury coverage should not encourage intentional pollution and should not offend public policy.

¹⁷² Comments, "Definition-Occurrence," at 2, Revised Explanatory Memorandum and Analytical Comments to Revised Draft of Commercial General Liability Policy, attached to Letter, M. Jendraszek, General Liability Division of ISO to the Members of the General Liability Rules and Forms Committee (Sept. 28, 1978); *see also* Mehr, et al., *supra* note 137, at 310 ("Personal injury liability coverage . . . covers claims alleging intentional torts"); Farbstein & Stillman, *supra* note 126, at 1239-40 ("The personal injury endorsement . . . [attempts] to furnish coverage under some circumstances for harm inflicted intentionally by the insured.").

¹⁷³ The standard form pollution exclusion, by its terms, applies only to "bodily injury or property damage." Had it been intended to apply to personal injury, the phrase "personal injury" could have been included. As noted above, ISO drafters recognized that the pollution exclusion would not apply to personal injury coverage unless its wording were changed. In fact, in *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265 (1st Cir. 1990), the First Circuit expressly rejected the argument that a pollution exclusion applied to personal injury coverage. As the court noted, "pollution exclusion clauses only apply to liability for 'bodily injury and property damage'; they do not apply to coverage for 'personal injury or advertising injury' liability." *Id.* at 270. The court therefore held that "claims of liability for interference with quiet enjoyment and use" of property arising from pollution "are not excluded by the pollution exclusion clause" *Id.* at 274. Likewise, by its terms the "owned property" exclusion applies only to "property damage" to property owned, occupied by or rented to the insured. *See, e.g., Insurance Services Office, Inc., Commercial General Liability Insurance Policy Form*, § 1, Coverage A, Exclusion J (1982).

Fifth, and finally, many insurance carriers fail to reserve their rights with respect to personal injury coverage when they send reservation of rights letters or declination letters regarding environmental claims. As a result, they may be estopped from asserting or be deemed to have waived those rights.¹⁷⁴

VII. CONCLUSION

Insurance carriers may protest about the high cost of paying claims under CGL policies, but those policies were sold as providing broad "comprehensive" coverage. The exclusions contained therein should not be retroactively expanded and the broad coverage provided by the personal injury provisions should not be retroactively narrowed. While litigation may not be the most desirable way for insureds to enforce their rights against their insurance carriers, insureds are entitled to the protection for which they paid. And, while insurance coverage litigation over environmental claims is likely to go on for years, courts are likely to continue granting that protection.

¹⁷⁴ See *Dillingham Corp. v. Employers Mut. Liab. Ins. Co.*, 503 F.2d 1181, 1185 (9th Cir. 1974) ("When an insurer denies liability upon a specific ground, other grounds of forfeiture then within its knowledge are waived."); A. WINDT, *INSURANCE CLAIMS AND DISPUTES* § 2.13, at 50-51 (2d ed. 1988) ("The courts have generally held that insurers are precluded from later asserting policy defenses that are not so specified" in reservation of rights letters).

